

SEP 17 1990

JOSEPH F. SPANOL, JR.
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No.

**IN THE SUPREME COURT
OF THE
UNITED STATES**

OCTOBER TERM, 1990

JASON WILLIAMS,

Petitioner

v.

**PIMA COUNTY; THE PIMA COUNTY MERIT
COMMISSION; AND CLARENCE DUPNIK, Sheriff of
Pima County,
*Respondents***

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE
OF ARIZONA**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- A. Whether a tenured public employee's procedural due process right to a pre-termination hearing was violated where his pre-termination hearing consisted of a compelled statement to an internal affairs investigator, he was not informed of the evidence supporting his termination, he was not provided notice that mandatory questioning by the internal affairs investigator was his pre-termination hearing, he was not informed of the pendency or contemplation of a dismissal order, he was not informed of the actual rules which he is alleged to have violated, he was not given the opportunity to prepare a response and submit evidence on his own behalf, and he was not given the opportunity to explain why a penalty less than termination should be imposed?
- B. Does termination of a public employee for refusing to answer questions which do not specifically, directly and narrowly relate to the performance of his official duties, and where he is not informed that the "fruits" of any statement he makes will not be used against him in any criminal prosecution, violate the public employee's Fifth Amendment and Fourteenth Amendment rights?

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OPINIONS BELOW

The Supreme Court of Arizona Order denying Jason Williams Petition for Review of the Arizona Court of Appeals Opinion was not published. It is reproduced here as Appendix A.

The Arizona Court of Appeals Opinion was reported at 791 P.2d 1053, 49 Ariz. Adv. Rep. 76. The Opinion is reproduced here as Appendix C.

The Findings of Fact, Conclusions of Law and Judgment of the Superior Court of the State of Arizona was not published. It is reproduced as Appendix D.

The Pima County Merit Commission Hearing Officer's Report was not published. It is reproduced here as Appendix F.

STATEMENT OF JURISDICTION

The Supreme Court of Arizona denied Jason Williams Petition for Review of the Arizona Court of Appeals Opinion on June 19, 1990. See Appendix A. Petitioner believes this Court has jurisdiction of this Petition for Writ of Certiorari pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

This case involves the interpretation of the Fifth Amendment to the United States Constitution and Section 1 of the Fourteenth Amendment to the United States Constitution. These Amendments provide as follows:

AMENDMENT V TO THE UNITED STATES CONSTITUTION

**Capital crimes; double jeopardy; self-incrimination;
due process; just compensation for property**

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service

in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

§1. Citizenship rights not to be abridged by states

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

RULES INVOLVED IN THIS CASE

This case also involves Pima County Sheriffs Department Rules 7.01 5, 7.02 6 and 7.05 7. These rules provide as follows:

7.01 5. "Employees shall not reveal official business of the department except: A. Release of public records. B. Release of information to members of the criminal justice system for official use. C. Release of information in accordance with Privacy and Security Procedures. D. Release of court-ordered information. E. Release of non-confidential information concerning daily departmental activities to the news media."

7.02 6. "Employees shall not divulge the criminal records of any other person except: A. In accordance with Privacy and Security Procedure. B. To members of the criminal justice system for official use. C. When ordered to do so by a court."

7.05 7. "Evidence, abandoned and found property, property maintained for safekeeping, and other property received by an employee of this Department shall not be used, utilized, converted, copied, distributed, et cetera, for personal use by any employee."

STATEMENT OF THE CASE

Jason Williams was a full-time permanent employee of Pima County. He was employed as a Pima County Corrections Officer; a civilian employee of the Pima County Sheriff's Department working at the Pima County Jail. There is no dispute that he had property interests protected by the due process clause of the Fourteenth Amendment.

On two occasions, once in May, 1982 and again in August, 1982, a person utilizing what was reported to be a unmarked police vehicle, stopped single women operating motor vehicles late at night by utilizing wig-wag lights. Mr. Williams was questioned after the initial incident by a police investigator and cooperated with the investigation by answering questions, providing information regarding his whereabouts at the time of the incident and allowing the inspection of his vehicle. A-36. No further action was taken until after the second incident.

After the second incident, police authorities obtained a search warrant and searched Mr. Williams' home. Certain work related jail documents were found at his home during the search. Mr. Williams retained an attorney to represent him.

On September 8, 1982, Jason Williams was summoned by an Internal Affairs Investigator of the Pima County Sheriff's Office to give a "statement". A-63. Although Mr. Williams was informed that he could be terminated for refusing to answer questions regarding the incidents and was informed that his statements could not be used against him in a criminal prosecution; he was not informed of any of the following:

- (1) that the statement he was being asked to give was a pre-termination hearing;
- (2) of the charges against him, the rules that he was alleged to have violated or the evidence against him;
- (3) that the Sheriff was contemplating terminating him;
- (4) that questioning would be limited to questions which specifically, directly and narrowly related to the performance of his official duties; or
- (5) that the "fruits" of his statement could not be used against him.

Appendices N and O and P.

Moreover, Jason Williams was specifically informed by the Internal Affairs Investigator that if something came out of the interview that would be detrimental it could be used at a later time regarding his continued employment but that the investigator did not know if any adverse action would be taken. He further stated that if Jason refused to answer questions it would be up to the Sheriff to decide what his refusal meant and what action would be taken. Appendix N at A-66.

Although prior to the time a determination to fire him was made, he was questioned regarding the stopping of drivers and the jail records, prior to his termination Mr. Williams was not informed of the specific reasons for which he was being terminated, given an opportunity to review the evidence against him, compare it to the charges against him or state why the evidence was wrong, why the violations did not occur, or if they did occur, why he should not be terminated.

On September 13, 1982, Jason Williams received a Notice of Termination setting forth for the first time the rules which he was alleged to have violated. Appendix G.

This letter still did not set forth the evidence that allegedly linked him to the vehicle stops of the two women. Although one of the rules relied upon for purposes of terminating him, because of his possession of the documents at his home, was read to him during the course of the "statement" he was required to give (Rule 7.05 7) he was never informed prior to his termination of the other rules he was alleged to have violated, (Rules 7.01 5 or 7.02 6.)

On September 21, 1982, Jason filed his appeal from his termination with the Pima County Merit Commission. See Appendix H. This appeal claims that the termination was improper since, in part:

1. He was deprived of due process of law in that no notice of pending charges was served upon him; that he was not aware of the facts concerning the charges set forth in the Notice of Termination; that no hearing was provided him; that he was given no opportunity to rebut the charges set forth in the Notice of Termination;

5. that he was threatened with the loss of his job if he did not give a statement concerning matters which were the subject of an ongoing criminal investigation concerning himself;
6. that he was deprived of his rights in that he was threatened with the loss of his job if he did not waive his right to assert the Fifth Amendment;

11. that the Notice of Termination indicated that "The investigation has revealed information which may indicate ques-

tionable activities by you..."; that the charge contains no specifics and Appellant cannot answer those charges because of their ambiguity, and that, without accusations of a specific nature, your Appellant cannot be dismissed;

12. that it cannot be insubordination to refuse to waive Fifth Amendment rights or to refuse to answer questions concerning an ongoing criminal investigation where Appellant is the subject of that criminal investigation or to give a statement under the duress of losing his job;

14. that the Sheriff's Department refused to give information to Appellant concerning those incidents which would have allowed Appellant the opportunity to clear himself...."

See Appendix H. Clearly, Mr. Williams immediately preserved the Constitutional issues which he now asks this Court to decide.

A review of the Notice of Termination reveals that there was never any allegation that the incidents regarding stopping vehicles occurred while Jason Williams was acting in the course and scope of his employment. In fact, the Notice specifically states that these incidents occurred while he was in off duty status. Appendix G at A-38.

Jason Williams was provided a post-termination hearing on October 21 and October 27, 1982. The Hearing Officer prepared a report summarizing the hearing and recommending Jason Williams' termination be upheld and his Appeal dismissed. See Appendix F. The Merit Commission dismissed Jason Williams' Appeal on January 27, 1983. See Appendix E.

A review of the Hearing Officer's Report, Appendix F, reflects that Jason Williams' attorney had subpoenaed Pima County's criminal investigation file regarding the stopping of the two women. The Sheriff's attorney agreed that no information from the criminal investigation would be introduced at the hearing and Jason Williams' attorneys request for the criminal file was repealed. Appendix F at A-32. This again resulted in Mr. Williams not being provided with the "evidence" of his alleged involvement in the stop of the vehicles.

The hearing proceeded only upon (1) his refusal to answer questions regarding his alleged involvement in the stop of vehicles; and (2) his alleged violation of rules relating to jail documents found at his home during the search of his home. These documents consisted of copies of Court Orders which were part of the public records regarding criminal cases pending in Pima County and copies of booking slips containing information on individuals who had been arrested. The information on the booking slips consisted of information that could have been found in a search of public drivers license documents. In other words, all of the documents he had at his home were either public records or the information could be gleaned from public records.

Neither the Hearing Officer's Report nor the Merit Commission addressed Mr. Williams' due process claim. See Appendix F and G.

Mr. Williams appealed the Merit Commission's dismissal of his Appeal to the Pima County Superior Court. Again, the Constitutional issues presented here were preserved. See Appendices J, K and L. The Superior Court reversed the Merit Commission; finding that Mr. Williams' Fifth Amendment and Fourteenth Amendment rights had been violated. See Appendix D. The respondents here appealed to the Arizona Court of Appeals. The Constitutional issues were preserved by Petitioner. The Court of Appeals reversed the Superior Court. Appendix C. Judge

Livermore filed a concurring opinion where he disagreed with the majority's opinion regarding the Fifth Amendment issue finding that the majority failed to follow this Court's Opinion in *Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968) which held that a public employee may be dismissed for refusing to answer questions on the basis of the self-incrimination privilege only if those questions specifically, directly and narrowly relate to the performance of his official duties. Appendix C at p. A-___. The Court's opinion disagreed with the concurring opinion reasoning that Jason Williams was not terminated for asserting his Fifth Amendment rights. The Court stated: "He would likewise have been terminated if he had merely refused to answer without invoking the Fifth Amendment." Appendix C at A-12.

The Arizona Supreme Court refused to review the Court of Appeals Opinion; however, Justice Feldman voted to grant review as to the issue relating to the Fifth Amendment. Appendix A. The Constitutional issue presented to this Court were again preserved. See Appendix M.

The conversation and compelled statement that the Arizona Court of Appeals found to meet the requirements of due process were recorded and are reproduced here as Appendices N, O and P.

ARGUMENTS IN SUPPORT OF ACCEPTANCE OF THE PETITION FOR A WRIT OF CERTIORARI

- A. JASON WILLIAMS WAS DENIED DUE PROCESS OF LAW WHERE, AS A PUBLIC EMPLOYEE, HIS ALLEGED PRE-TERMINATION HEARING CONSISTED OF A COMPELLED STATEMENT TO AN INTERNAL AFFAIRS INVESTIGATOR, HE WAS NOT INFORMED OF THE RULES HE WAS ALLEGED TO HAVE VIOLATED, HE WAS NOT INFORMED OF THE EVIDENCE SUPPORTING HIS TERMINATION, HE**

WAS NOT INFORMED OF THE PENDENCY OR CONTEMPLATION OF A DISMISSAL ACTION, HE WAS NOT GIVEN THE OPPORTUNITY TO PREPARE A RESPONSE AND SUBMIT EVIDENCE ON HIS OWN BEHALF, AND HE WAS NOT GIVEN THE OPPORTUNITY TO EXPLAIN WHY A PENALTY LESS THAN TERMINATION SHOULD BE IMPOSED.

This Court should accept this Petition on this issue since the Arizona court has decided a question regarding a constitutional issue in a way that conflicts with the decisions of this Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 34 L.Ed.2d 494 (1985), *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 107 S.Ct. 1740, 95 L.Ed.2d 239 (1987) and *Arnett V. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). The decision is also in conflict with almost every decision of a United States Court of Appeals or State Courts on this issue.

No previous Arizona decisions controlled the point of law regarding what due process should be provided to a public employee prior to his termination. The Court of Appeals resolved this question by stating that due process merely requires notice of the reasons for discharge and some reasonable format and opportunity to dispute the accusations before termination. The court stated as follows: "In other words, all *Loudermill* requires is an opportunity for an employee to give his side of the story before his employer reaches the decision to fire him." The Arizona Supreme Court refused to review this ruling.

Mr. Williams respectfully submits that the Court of Appeals' decision that he was provided due process under the facts of this case constitutes the most restrictive reading of a public employee's due process rights to a pre-termination hearing of any court to rule on this issue to this date. Moreover, the court's holding, although referring to Cleve-

land Board of Education v. Loudermill, is inconsistent with and fails to follow this Court's decision in Loudermill. In Loudermill this Court stated as follows:

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See Friendly, "Some Kind of Hearing." 123 U.Pa.L.Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

Mr. Williams's was never given "notice" of the specific charges against him, the employer's evidence or that his compelled statement was his opportunity to present his side of the story. He was not informed of any proposed action. In fact, he was specifically informed by the internal affairs investigator that he [the investigator] did not know if any adverse action would be taken. A-66. Although he was informed that he could be terminated for refusing to answer questions, he was never informed that his termination was being contemplated and given the opportunity to explain why he should not be terminated.

The Arizona Court completely ignores this Court's statement in Loudermill that the public employee must be given notice of the charges and an explanation of the employer's evidence. Although Respondents have in the past argued that Mr. Williams' attorney was aware of the evidence against him based upon his attorney's reference to having reviewed either the search warrant or the affidavit in support of the search warrant, Appendix N at A-64, this reference is ambiguous as to what was reviewed and there

is nothing in the record to indicate the contents of any document the attorney may have reviewed. Nor is there any mention that Jason Williams was aware of the alleged evidence against him. This is especially interesting since the internal affairs investigator specifically precluded Jason Williams' attorney from being present during the compelled statement that the Arizona Court of Appeals found was Jason's pre-termination hearing. Thus, even if Jason Williams' attorney had reviewed some materials, there is no evidence Jason Williams had any knowledge of the alleged evidence against him.

A review of a transcript of the alleged pre-termination hearing, Appendix O, reveals that Jason Williams was never informed that he may be terminated for having jail documents at his home. Although one rule that he was later alleged to have violated was read to him during his statement, the other two rules were never disclosed until his termination. He was never informed he was suspected of violating any of the rules or informed that the Sheriff was contemplating terminating him for violating those rules. The three rules he was alleged to have violated are set forth above immediately prior to the statement of the case. Had he been informed of these rules prior to his termination, he could have set forth good reasons why he should not have been terminated since, as the Superior Court found, Appendix D at A-23, there was no evidence that he had revealed official business, divulged criminal records or used evidence or abandoned or found property for personal use. If he had broken any of these rules, it was an unintentional violation that was being committed by other employees and he should have been given an opportunity to point out his previous outstanding evaluations and promotions as mitigating factors against termination and in favor of a lesser sanction.

Mr. Williams respectfully submits that he was denied the minimal due process rights as set forth by this Court in *Loudermill*. Moreover, Justice Brennan, in his concurring

opinion in *Loudermill* noted:

"The Court today does not prescribe the precise form of required pre-termination procedures in cases where an employee disputes the facts proffered to support his discharge. The cases at hand involve, as the Court recognizes, employees who did not dispute the facts but had "plausible arguments to make that might have prevented their discharge." *Ante*, at 1494. In such cases, notice and an "opportunity to present reasons," *ante*, at 1495, are sufficient to protect the important interests at stake.

As the Court also correctly notes, other cases "will often involve factual disputes," *ante*, at 1494, such as allegedly erroneous records or false accusations. As Justice MARSHALL has previously noted and stresses again today, where there exist not just plausible arguments to be made, but also "substantial disputes in testimonial evidence," due process may well require more than a simple opportunity to argue or deny. *Arnett v. Kennedy*, 416 U.S. 134, 214, 94 S.Ct. 1633, 1674, 40 L.Ed.2d 15 (1974) (MARSHALL, J., dissenting). The Court acknowledges that what the Constitution requires prior to discharge, in general terms, is pre-termination procedures sufficient to provide "an initial check against mistaken decisions -essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Ante*, at 1495 (emphasis added). When factual disputes are involved, therefore, an employee may deserve a

fair opportunity before discharge to produce contrary records or testimony, or even to confront an accuser in front of the decision maker. Such an opportunity might not necessitate "elaborate" procedures, see ante, at 1495, but the fact remains that in some cases only such an opportunity to challenge the source or produce contrary evidence will suffice to support a finding that there are "reasonable grounds" to believe accusations are "true."

In *Brock v. Roadway Express, Inc.*, supra, this Court considered the question of what procedural process was required where a terminated employee of a trucking company requested the Department of Labor to reinstate him, pending a full hearing, based on his allegation that he was terminated in retaliation for his previous reporting of unsafe equipment on his vehicle. The Court in *Brock* discussed the question of what constituted a meaningful opportunity to be heard. The Court concluded that minimum due process for the employer in this context required notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response and an opportunity to meet with the investigator and present statements from rebuttal witnesses. In arriving at this conclusion, the Court relied upon its previous decision in *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) where the Court upheld the procedures for termination of a federal government employee which afforded the employee advance written notice of the reasons for its proposed discharge and the materials on which the notice was based, and the right to respond to the charges, both orally and in writing, including the submission of affidavits.

Mr. Williams respectfully submits that the important constitutional issue regarding what due process a public

employee is entitled to prior to his termination has been incorrectly decided by the Arizona courts and this court should accept review to correctly state and apply the law. Under the Arizona Court's Opinion in this case, due process is complied with where an employee appears at a mandatory question and answer session, he is not informed of the evidence against him, he is not informed it is his opportunity to be heard, he is not informed of the rules he is alleged to have violated, he is not given notice and an opportunity to respond as to either why he is not guilty of the infraction or why he should not be terminated.

In addition to being contrary to this Court's decisions in *Loudermill* and *Brock*, the Arizona Court's decision is contrary to the following United States Courts of Appeals decisions.

The Arizona Court did not require Pima County to inform Jason of the pendency or contemplation of a dismissal action, the charges against him, or to give an explanation of its evidence. In *Matthews v. Harney County, Oregon, School District No. 4*, 819 F.2d 889 (9th Cir. 1987), the Court stated that:

"On the issue of notice, we read *Loudermill* to require, in advance of any pre-termination hearing (1) notice to the employee as to the pendency or contemplation of a dismissal action, and (2) notice as to the charges and evidence which give rise to that concern."
(Emphasis added)

The Arizona Court implicitly allowed Mr. Williams' termination to stand even though he was only notified of one of three rules relating to documents. Even then he was not alleged to have violated that rule. In *Peery v. Brakke*, 826 F.2d 740 (8th Cir. 1987), the Court discussed a situation where the employee had been informed of one of the charges prior to the meeting, but had no prior notice of the other charges. The Court stated that:

"Even if the series of critical memos and letters could be interpreted as general notice to Peery of job performance problems, the termination notice Brakke prepared listed seven specific 'incidents' as grounds for discharge. These charges were, in large part, new to Peery and had not appeared in any earlier memo or letter. Further, Peery was given no opportunity to respond to these specific charges before being fired. Where an employee received notice of charges before termination, but is not given an opportunity to respond to the charges until after discharge, due process is not satisfied."

The Arizona Court allowed Mr. Williams' termination to stand even though his alleged pre-termination hearing was with an internal affairs investigator who did not know if adverse action would be taken against him. He was not given the opportunity to respond in writing. However, in *Hatcher v. Board of Education*, 809 F.2d 1546, 1554 (11th Cir. 1987), the Court stated:

"Effective rebuttal must give the employee the right to respond in writing to the charges made and to respond orally before the official charged with making the...decision."

In *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974), this Court upheld as complying with Constitutional requirements of due process, a statute which provided that a public employee was entitled to 30 days advance written notice of the reasons for his proposed discharge and the materials on which the notice was based, the right to respond to the charges both orally and in writing, including submissions of affidavits, and upon request, the opportunity to appear personally before the official having the authority to make or recommend the final decision. 416 U.S. at 1652 (J. Powell, Concurring opinion). Although, *Arnett v. Kennedy* was decided by a plurality decision, no member of this Court reflected any disagreement that the above pre-termination rights were necessary

to comply with due process in that case. Now, fifteen years later the Arizona Court has eliminated 30 days notice, eliminated written notice, eliminated the requirement that the employer notify the employee of the reasons for the discharge and provide the materials on which the notice was based; eliminated the opportunity to respond in writing with affidavits of witnesses and eliminated the opportunity to appear personally before the person who has authority to make or recommend the final decision. Instead, in Arizona due process is complied with by calling a person before an internal affairs investigator and questioning him about allegations of which he does not know the basis, without informing him his termination was being contemplated, without informing him of the rules he was alleged to have violated and without informing him of the evidence against him. Mr. Williams asks you to accept this Petition and reinforce to Arizona Courts that due process is not that shallow.

B. Jason Williams' Fifth Amendment And Fourteenth Amendment Rights Were Violated When He Was Terminated For Failure To Answer Questions Which Did Not Specifically, Directly And Narrowly Relate To The Performance Of His Official Duties And Since He Was Not Informed That The "Fruits" Of His Answers Would Not Be Used Against Him In Any Criminal Prosecution.

This Court should accept this Petition since the Arizona Court has decided a federal question regarding a Constitutional issue in a way that conflicts with the decisions of this Court in *Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1039 (1968); *Uniformed Sanitation Men Ass'n. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 820, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968) (hereinafter Sanitation Men); *Lefkowitz v. Turley*, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973) and *Lefkowitz v. Cunningham*,

431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977).

In *Gardner v. Broderick*, supra, this Court stated as follows:

"If Appellant, a policeman, had refused to answer questions specifically, directly and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself...the privilege against self-incrimination would not have been a bar to his dismissal." (citations omitted). 392 U.S. at 278, 88 S.Ct. at 1916.

See also *Sanitation Men*, 392 U.S. at 284, 88 S.Ct. at 1920.

The Court in *Gardner v. Broderick* and *Sanitation Men*, apparently saw the above holding as a logical extension of two cases decided in the previous term, *Garrity v. State of New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) and *Spivak v. Klein*, 385 U.S. 511, 87 S.Ct. 625 (1967). In *Garrity*, the Court in a 5-4 decision held that the protection of the individual against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office. 385 U.S. at 500, 87 S.Ct. at 620. In *Spivak v. Klein*, supra, in a plurality decision, the Court held that an attorney could not be disbarred based upon his refusal to testify and produce subpoenaed financial records based upon his assertion of his Fifth and Fourteenth Amendment right not to incriminate himself. 385 U.S. at 514-16, 87 S.Ct. at 627-8. In his concurring opinion, Justice Fortas provided the tie-breaking vote but distinguished the lawyer's right to remain silent "and that of a public employee who is asked questions specifically, directly and narrowly relating to the performance of his official duties as distinguished from his beliefs or other matters that are not within the scope of the specific duties which he undertook to perform..."

Interestingly, the dissenters in *Garrity v. State of New Jersey, supra*, and *Spivak v. Klein, supra*, agreed with the majority in *Gardner v. Broderick, supra*, and *Sanitation Men, supra*. In his separate opinion to these cases, Justice Harlan joined by Justice Stewart, concurred with the holdings stating "I find in these opinions a procedural formula whereby, for example, public officials may now be discharged and lawyer disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices." 392 U.S. at 280, 88 S.Ct. at 1920 (1968).

The holdings in *Gardner v. Broderick*, and *Sanitation Men*, were more recently confirmed by this Court in *Lefkowitz v. Turley*, 414 U.S. at 80-84, 94 S.Ct. at 324-5, and *Lefkowitz v. Cunningham*, 431 U.S. at 806, 97 S.Ct. at 2136 ("Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity". (emphasis added)).

The above cases decided by this Court establish conclusively that a public employee cannot be terminated for refusing to answer questions which are not specifically, directly and narrowly related to their performance or where he is not protected from the use of his statements and the "fruits" of his statements in subsequent criminal proceedings.

A review of the transcripts of the preliminary conversation, Appendix N, and Jason Williams' compelled statement, Appendix O, shows that Jason Williams answered questions relating to his performance of his official duties. At no time was he informed that the questions related to the stops of the vehicles were considered to be questions in any way, much less specifically, directly and narrowly, related to his job performance. In fact, his termination letter, Appendix G, states specifically that he was alleged to be

involved in the incidents "while on off-duty status". A-38.

Although Jason was advised that his answers to questions would not be used against him in criminal proceedings, he was never advised that the "fruits" of those statements would not be used against him in criminal proceedings. Appendices N, O and P. The fact that the fruits would not be used was never brought home to Jason despite the fact that his attorney expressed his concern that the admittedly "parallel investigation", A-67, would spill over into the criminal investigation. Appendix P, A-65 and A-100.

Jason Williams asks this Court to accept this Petition and hold that he was improperly discharged for asserting his Fifth and Fourteenth Amendment rights and refusing to answer questions which did not specifically, directly and narrowly relate to the performance of his official duties and where he was not informed that "fruits" of his statements could not be used against him in criminal proceedings.

CONCLUSION

Jason Williams was thrust into a situation where he was wrongfully accused of being involved in serious crimes involving the stopping and attempted assaults of two women. Although no criminal charges were brought against him and administrative charges related to his alleged involvement in these crimes were dropped, Jason lost his job in the field of his choice, corrections. He cannot obtain another job in that field with his record of termination.

Upon being involved in this situation, he hired an attorney who gave him sound legal advice based upon this Court's decisions as discussed herein. Despite his reliance on the sound legal advice, he was terminated for asserting his Fifth and Fourteenth Amendment right to remain silent and not be a witness against himself. He was terminated for possessing records in his home without being informed of the rules he was alleged to have violated, that his termination was being considered or under contemplation for having those records in his home and without being given the

opportunity to prepare a response, submit evidence or explain why he should not be terminated. Similarly, he was not informed of the evidence allegedly connecting him to the criminal incidents or given the opportunity to prepare a response or submit evidence on his own behalf.

Jason Williams has had two of his vital constitutional rights violated. As a result his life was turned upside down. He, and other Arizonans, need this Court's help.

Kenneth K. Graham
RISNER & GRAHAM
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(602) 622-7494
Counsel of Record for Petitioner

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APPENDIX A

NOEL K. DESSAINT
Clerk of Court
COURT OF APPEALS
DIVISION TWO

FILED BY CLERK
Jun 22 1990

SUPREME COURT
STATE OF ARIZONA

201 West Wing State Capital
1700 West Washington
Phoenix, Arizona 85007-2866

Telephone (602) 542-4536

June 20, 1990

RE: JASON WILLIAMS vs. PIMA COUNTY - MERIT
SYSTEM COMMISSION/
DUPNIK - Sheriff
Supreme Court No. CV-90-0074-PR
Court of Appeals No. 2 CA-CV 88-0383
Pima County No. 206977

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 19, 1990, in regard to the above-referenced cause:

ORDERED: Petition for Review by the Supreme Court =
DENIED.

Vice Chief Justice Feldman voting to grant as to Issue B.
Record returned to the Court of Appeals, Division Two,
Tucson, this 20th day of June, 1990.

NOEL K. DESSAINT, Clerk

TO:

Kenneth K. Graham, Esq., Risner & Graham, 100 N. Stone,
Suite 901., Tucson, AZ 85701

Stephen D. Neely, Pima County Attorney, 32 North Stone
Avenue, Tucson, AZ 85701 Attn: Michael P. Callahan, Esq.

Barry M. Corey, Esq., and Darlene Millar-Espinosa, Esq.,
Corey & Farrell, P.C., 177 N. Church Ave., Suite 600,
Tucson, AZ 85701

Joyce A. Goldsmith, Clerk, Court of Appeals, Division Two,
416 W. Congress, Tucson, AZ 85701

Mead Data Central, P.O. Box 933, Dayton, Ohio 45401

PIMA COUNTY SHERIFF'S DEPARTMENT

P.O. Box 910, Tucson, Arizona 85702, Phone (602) 882-2600

APPENDIX B

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

January 23, 1990

RE: WILLIAMS v. PIMA CO.
2 CA-CV 88-0383
PIMA County Superior Court Cause No. 206977

The following action was taken by the Court of Appeals for the State of Arizona, Division Two, Department B, on January 22, 1990, in the above-referenced cause:

"ORDERED: Motion for Reconsideration is DENIED."

JOYCE A. GOLDSMITH, Clerk

APPENDIX C

[FILED BY CLERK
DEC 14 1989
Court of Appeals
Division Two]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JASON WILLIAMS,
Plaintiff/Appellee/Cross-Appellant,

v.

PIMA COUNTY; THE PIMA COUNTY
MERIT SYSTEM COMMISSION; and
CLARENCE DUPNIK, Sheriff of
Pima County,

Defendants/Appellants/
Cross-Appellees

OPINION

APPEAL FROM THE SUPERIOR COURT OF PIMA
COUNTY

2 CA-CV 88-0383
Department B
Cause No. 206977

Honorable Michael Brown, Judge

REVERSED

RISNER & GRAHAM
by Kenneth K. Graham

Tucson

Attorneys for Plaintiff/Appellee/Cross-Appellant

COREY & FARRELL, P.C.
by Brenda S. Cook, Barry M. Corey
and Darlene Millar-Espinosa

Tucson

Attorneys for Defendant/Appellant/Cross-Appellee
Pima County Merit System Commission

Stephen D. Neely, Pima County Attorney
by Michael P. Callahan

Tucson

Attorneys for Defendants/Appellants/ Cross-Appellees
Pima County and Dupnik

LACAGNINA, Judge.

The Pima County Merit System Commission, Pima County and Clarence Dupnik, Pima County Sheriff, appeal from a judgment of the superior court reversing the termination of Jason Williams, a corrections officer employed by the Pima County Sheriff's Office, and ordering his reinstatement with back pay. After a court-ordered hearing, the commission awarded back pay mitigation damages and interest in the amount of \$59,235.65, and the trial court entered judgment for that amount, together with costs and interest until paid. Williams has cross-appealed claiming the monetary judgment was insufficient.

We reverse the judgment of the trial court reinstating Williams and ordering payment of damages for the following reasons:

1. There was sufficient evidence to support the findings and decision of the Pima County Merit System Commission to uphold Williams' termination.
2. Williams' participation in the investigation of alle-

gations made against him satisfied any *Loudermill* (*Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)), pretermination requirements.

3. Williams' refusal to answer his employer's questions, which answers could not be used against him in criminal proceedings, was a sufficient ground to support his dismissal.

4. Williams was not entitled to the assistance of counsel during an interview and investigation by his employer.

FACTS AND PROCEDURAL BACKGROUND

Jason Williams was hired by the Pima County Jail as a corrections officer in October 1979. An internal affairs investigation into incidents which occurred on May 13 and August 5, 1982, involving young women motorists who were stopped late at night by a man posing as a law enforcement officer, led to the issuance of a search warrant for Williams' residence. As a result of the search of Williams' residence, which revealed many weapons, court records and booking slips, on August 19, 1982, Williams was placed on administrative leave pending an investigation by the Pima County Sheriff's Department.

On September 8, 1982, an internal affairs investigator conducted a tape-recorded interview with Williams. Williams' attorney was present during a discussion of the scope of the interview and the consequences of his refusal to answer questions. Williams was advised that his attorney could not be present when he was questioned about the May 13 and August 5, 1982 incidents and the department records found at his residence. Williams and his attorney were told that the answers given by Williams to questions asked during the interview would not be used against him in any criminal proceedings, but that his employment could be terminated for refusing to answer. Williams refused to answer any questions regarding the May and August incidents by invoking his fifth amendment right to remain

silent.

On September 13, 1982, Williams was given written notice of his termination based on his refusal to answer questions during the internal affairs investigation, the possession of booking records and other documents at his residence and information received by the department indicating that Williams was involved in the May and August incidents. On October 21 and 27, 1982, a hearing was conducted by a hearing officer upon Williams' appeal to the Pima County Merit System Commission. Williams appeared with his attorney and testified. Parts of the reporter's transcript of these hearings were destroyed by accidents in 1983 and 1984. The hearing officer prepared and submitted to the commission a report containing a summary of all of the testimony which concluded that Williams was properly terminated and recommended that his appeal be dismissed. On January 25, 1983, the commission decided in accordance with the hearing officer's report and conclusions that Williams' appeal should be dismissed. Review by the superior court of the commission's decision was based upon the record, the file, exhibits and the hearing officer's report and findings.

STANDARD OF REVIEW

Williams' complaint to the superior court was pursuant to A.R.S. Sec. 12-901 through 12-914 for review of the action taken by the commission. If there is substantial evidence in the record to support the commission's decision, the trial court must affirm.

Taylor v. Arizona Law Enforcement Merit System Council, 152 Ariz. 200, 731 P.2d 95 (App. 1986); *DeGroot v. Arizona Racing Commission*, 141 Ariz. 331, 686 P.2d 1301 (App. 1984); *Petrus v. Arizona State Liquor Board*, 129 Ariz. 449, 641 P.2d 1107 (App. 1981).

On appeal, the trial court may not re-weigh the evidence presented to the commission. See *Arizona Board of Regents*

v. Superior Court, 106 Ariz. 430, 477 P.2d 520 (1970). In addition, if two inconsistent factual conclusions can be supported by the record, then there is substantial evidence to support an administrative decision that elects either conclusion. *Webster v. State Board of Regents*, 123 Ariz. 363, 599 P.2d 816 (App. 1979).

POSSESSION OF JAIL RECORDS

The trial court erroneously found from the record that Williams' possession of the booking records and other documents was not a violation of department rules, "since there was no evidence that [Williams] revealed any 'official business' of the Pima County Sheriff's Department, or that [Williams] divulged any criminal records, or that [Williams] used, utilized, converted, copied or distributed for personal use departmental records." The trial court also found that even if "some strained construction" of the rules could be considered a violation, it did not justify termination. The evidence from which these findings were made was disputed at Williams' hearing. The trial court on review of the commission's action has no authority to make an independent finding of fact and is required only to search the record to determine if evidence was presented which would support the commission's finding that departmental rules were broken.

Williams admitted he had booking slips containing personal information concerning inmates and photos of prisoners just lying around his home, a home shared with others, for no reason at all. He admitted he did not take them home as part of his official duties and did not use them for duty-related work at home. His admissions, together with conflicting testimony regarding the disposal of booking records by other department employees, was sufficient to sustain the hearing officer's conclusion that departmental rules were broken, and the commission's action affirming Williams' termination based on the hearing officer's findings and conclusions was not arbitrary. *Arizona Board of*

Regents v. Superior Court, supra; Taylor v. Arizona Law Enforcement Merit Commission, supra; DeGroot v. Arizona Racing Commission, supra; Petras v. Arizona State Liquor Board, supra. The trial court's finding and conclusion that even if Williams violated the rules and regulations related to possession of department documents, the violations would not justify termination, was a finding of fact precluded by the case law governing the standard of review by the superior court on appeals from decisions of an administrative agency.

REFUSAL TO ANSWER QUESTIONS

Williams was terminated because he refused to answer questions during an internal affairs investigation. The record is clear that he knew he would be fired for not answering the questions. He invoked the fifth amendment, even though he was advised that his answers would not be used against him in criminal proceedings. The trial court's conclusion that "[p]laintiff may not be fired from his job in compliance with due process of law for exercising his Fifth Amendment rights against self incrimination without a properly authorized grant of immunity" is erroneous. *Rivera v. City of Douglas*, 132 Ariz. 177, 121, 644 P.2d 271, 275 (App. 1982); *Eshelman v. Blubaum*, 144 Ariz. 376, 379, 560 P.2d 1283, 1286 (App. 1977).

As an employee of the sheriff's department, Williams was required to conduct himself in a manner reflecting favorably on the department, both on and off duty. The investigation into allegations that an employee may have been impersonating a law enforcement officer and assaulting young women concerned conduct that violated department rules and justified the questioning of Williams about his off-duty conduct. See *City of Tucson v. Mills*, 114 Ariz. 107, 112, 559 P.2d 663, 668 (App. 1976). In this case, his off-duty conduct was related to his job performance and, therefore, the proper subject of inquiry.

The trial court correctly concluded that at any criminal

trial in which Williams, statements were offered against him, the statements would have been suppressed because they were obtained by compulsion. *Garrity v. State of New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). However, that fact is irrelevant to his termination. A grant of immunity by a proper judicial officer was not a prerequisite to his employer's right to require that he answer the employer's questions during the investigation. The commission properly concluded, supported by substantial evidence, that Williams' employment should be terminated for his refusal to answer questions and cooperate in the investigation. In addition, we disagree with the special concurrence that Williams was terminated because he invoked the fifth amendment. His silence, in response to his employer's legitimate inquiry concerning his off-duty conduct relating to job performance, was the reason for his termination. He would likewise have been terminated if he had merely refused to answer without invoking the fifth amendment.

DUE PROCESS UNDER LOUDERMILL

The trial court concluded that Williams was entitled to a pre-termination hearing as mandated by *Cleveland Board of Education v. Loudermill*, *supra*. *Loudermill* does not require an adversarial hearing but merely notice of the reasons for discharge and some reasonable format and opportunity to dispute the accusations before termination. In other words, all *Loudermill* requires is an opportunity for an employee to give his side of the story before his employer reaches the decision to fire him. *Zavala v. Arizona State Personnel Board*, 159 Ariz. 256, 766 P.2d 608 (App. 1987). The facts of this case meet all of the *Loudermill* requirements. Williams knew about the charge of mishandling records and gave his side of the story to the investigator. He knew that if he refused to answer questions about his off-duty conduct involving the impersonation of a law enforcement officer and the assaults, he would be fired. The due process notice requirements were met. He waived the

opportunity to give his side of the story and any claim of lack of due process when he refused to answer his employer's questions. The September 8, 1982 interview met the *Loudermill* due process requirements. As stated by the Sixth Circuit in the second *Loudermill* case, *Loudermill v. Cleveland Board of Education*, 844 F.2d 304, 312 (6th Cir.), *cert. denied*, 109 S.Ct. 363 (1988):

[C]ourts construing the Supreme Court's language in *Loudermill* have required only the barest of a pretermination procedure, especially when an elaborate post-termination procedure is in place. See, e.g., *Buschi v. Kirven*, 775 F.2d 1240, 1256 (4th Cir. 1985); *Kelly v. Smith*, 764 F.2d 1412, 1414 (11th Cir. 1985); *Brasslett v. Cota*, 761 F.2d 827, 836 (1st Cir. 1985). This court has also decided such questions of procedural due process requiring only the minimum of procedures. See *Gurish v. McFaul*, 801 F.2d 225, 227-28 (6th Cir. 1986) (indicating that an interview prior to termination by one not the ultimate decision-maker is enough to satisfy due process); *Lee v. Western Reserve Psychiatric Habilitation Center*, 747 F.2d 1062, 1068-69 (6th Cir. 1984) (all that is required is an "abbreviated opportunity to respond," and, under this standard, a letter informing one of the charges and an interview to explain them is sufficient). See also *Deryck v. Akron City School Dist.*, 633 F.Supp. 1180, 1183 (N.D. Ohio 1986), *aff'd without opinion*, 820 F.2d 405 (6th Cir. 1987).

While it might be tempting to make this test harder and require that a meeting be with the one actually empowered with the authority to

fire, the courts have not construed procedural due process to merit such a requirement.

RIGHT TO COUNSEL

The trial court also erroneously concluded that Williams' right to counsel under the sixth and fourteenth amendments to the United States Constitution and Article 2, Sec. 24 of the Arizona Constitution were violated when he was required to answer his employer's questions in the absence of his attorney. The sixth amendment to the United States Constitution and Article 2, Sec. 24 of the Arizona Constitution apply only to criminal proceedings. *State v. Superior Court*, 125 Ariz. 370, 373, 690 P.2d 1070, 1073 (App. 1980).

In the context of employer/employee relationships, the fourteenth amendment does not confer on an employee the right to counsel at a pretermination interview with his employer. Pretermination interviews which are informal should not unduly intrude on the employer's right to terminate an unsatisfactory employee. *Loudermill, supra*, 470 U.S. at 546, 105 S.Ct. at 1495, cf. *Wilson v. Swing*, 463 F.Supp. 555 (M.D.N.C. 1978). Williams did have an attorney at his formal hearing in compliance with due process requirements.

Issues raised in the briefs but not addressed in this decision either have no merit or were waived by the failure to object at the hearing. As part of the criminal investigation, the police obtained a subpoena and searched Williams' home, recovering the jail records mentioned above. Dupnik concedes that Williams and his lawyer made an agreement with Dupnik's lawyer that information from the criminal investigation would not be offered as a basis for Williams' termination. The trial court found the agreement was breached by use of the jail records obtained in the search of Williams' home. We disagree. Williams testified at length at the hearing, without object, as to the jail records. Neither Williams nor his lawyer ever objected that any questions

regarding those records violated any agreement. The hearing itself is proof of what the real agreement was — that Dupnik would not use any information concerning the incidents which occurred on May 13 and August 5 as a basis for Williams' termination. In fact, Williams took the fifth amendment as to those incidents.

In any event, any objection to an alleged technical violation of the agreement by the use of the records obtained from the search, as construed by Williams on appeal, was waived by his extensive testimony concerning the records. The hearing officer could not decide an issue not presented to him, nor can we review such an issue. *DeGroot v. Arizona Racing Comm'n, supra*. Absent consideration of the records, we can still sustain the commission's decision based solely upon Williams' testimony.

This decision reverses the judgment of the trial court setting aside Williams' termination; therefore, we need not address the cross-appeal involving issues of the proper award for damages because Williams was properly terminated and not entitled to any damages. In addition, the trial court had no authority to reinstate Williams; its authority was limited to remanding the case to the commission for further proceedings consistent with its opinion. *Zavala v. Arizona State Personnel Board, supra*; *City of Tucson v. Mills, supra*.

The judgment of the trial court is reversed. The case is remanded for entry of judgment in favor of Pima County, Pima County Merit System Commission and Dupnik, affirming Williams' termination of employment.

/s/ MICHAEL A. LACAGNINA
MICHAEL A. LACAGNINA

CONCURRING:

/s/ LLOYD FERNANDEZ
LLOYD FERNANDEZ, Chief Judge

Livermore, J., specially concurring

Because a public employee may be dismissed for refusing to answer questions on the basis of the self-incrimination privilege only if those questions specifically, directly, and narrowly relate to the performance of his official duties, *Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968), and because off-duty criminality, though undoubtedly embarrassing to the public employer, does not meet that test, I do not believe that Williams can be discharged for his refusal to answer questions. I concur because his possession of jail records provides an independent basis for discharge.

/s/ JOSEPH M. LIVERMORE

JOSEPH M. LIVERMORE, Presiding

APPENDIX D

OFFICE OF THE CLERK OF THE SUPERIOR COURT
PIMA COUNTY
PIMA COUNTY COURTS BUILDING
(602) 792-8351
Tucson, Arizona 85701

JAMES N. CORBETT
Clerk
Superior Court

SHERRY KENNEDY
Associate Clerk
Superior Court

November 16, 1988

Kenneth K. Graham, Esq.
Risner & Graham
100 North Stone, Suite 901
Tucson, AZ 85701

Michael Callahan
Pima County Attorney's Office
Civil Division
32 N. Stone
Tucson, AZ 85701

RE: No. 206977
WILLIAMS V. COUNTY OF PIMA

TO WHOM IT MAY CONCERN:

A Judgment was entered in the above-entitled action
on October 28, 1989.

Very truly yours,
JAMES N. CORBETT

/s/ _____

Deputy Clerk

RISNER & GRAHAM
ATTORNEYS AT LAW
100 North Stone, Suite 901
Tucson, Arizona 85701
(602) 622-7494

Kenneth K. Graham, Esq.
P.C.C. No. 21588

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

JASON WILLIAMS,

Plaintiff,

vs.

THE COUNTY OF PIMA, a body politic,
CLARENCE DUPNIK, Pima County Sheriff, and the
PIMA COUNTY MERIT SYSTEM COMMISSION,
Defendants.

NO. C-206977

Assigned to the Hon. Michael Brown

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDGMENT**

The Court hereby enters its Findings of Fact, its Conclusions of Law, and its Judgment in regards to the above-encaptioned matter as follows:

FINDINGS OF FACT

1. Plaintiff was a full time non-probationary employee of the Pima County Sheriff's Office who could be discharged only for cause.
2. On September 8, 1982, Plaintiff, along with his attorney, met with an Internal Affairs investigator. The Internal Affairs investigator sought to ask Plaintiff questions relating to two incidents which occurred on May 13, 1982, and August 5, 1982. These incidents involved criminal acts in which Plaintiff had been implicated. The Internal Affairs investigator also sought to ask questions relating to documents and other items which were discovered during the search of Plaintiff's residence.
3. Plaintiff was denied the ability to have his attorney remain with him during the questioning by the Internal Affairs officer, and, in fact, his attorney was forced to leave the room during the questioning.
4. Plaintiff was told by the Internal Affairs officer that his answers could not be used against him in a criminal prosecution. Plaintiff was not informed that evidence which was discovered as a result of his statements, the "fruits" of his statements, could not be used against him. Plaintiff made it clear, through his attorney, that he did not believe that his statements could not be used against him.

5. Although Plaintiff was informed he "could" be terminated if he refused to answer questions, Plaintiff was aware that he "would" be fired if he refused to answer the questions.
6. Plaintiff answered all questions asked of him except those relating to the incidents on May 13, 1982, and August 5, 1982, which questions related to criminal activity for which Plaintiff was a suspect under investigation.
7. The questions which Plaintiff refused to answer related to criminal acts which were not within Plaintiff's duties as a correctional officer at the Pima County Jail. Each time a question relating to these incidents was asked, Plaintiff indicated that on the advice of his attorney, he refused to answer the questions, asserting his Fifth and Sixth Amendment rights under the United States Constitution.
8. Plaintiff was never informed that the questions to be asked of him by the Internal Affairs investigator would relate specifically and narrowly to the performance of his official duties; and, in fact, the Internal Affairs officer did ask questions which did not specifically and narrowly relate to Plaintiff's performance of his official duties.
9. There was no evidence that Plaintiff was guilty of the substantive crime referred to, or that there was even sufficient cause to charge him with any offense.
10. On September 13, 1982, Plaintiff was

given notice that he was terminated from his position with the Pima County Sheriff's Office effective that same day without having either notice of a hearing or a hearing.

11. Plaintiff timely requested an administrative appeal of his termination contending that (1) he was deprived of due process of law and that no notice of pending charges was served upon him, he was not made aware of the facts concerning the charges set forth in the Notice of Termination, no hearing was afforded him, and he was given no opportunity to rebut the charges set forth in the Notice of Termination; (2) that coercion and threats were used to obtain a statement from him and that he was then fired based on that statement; (3) that he was deprived of his rights and he was not allowed to have his attorney present during the statements before the Internal Affairs Officer; (4) that he was threatened with the loss of his job if he did not give a statement concerning matters which were the subject of an ongoing criminal investigation concerning himself; (5) that he was deprived of his rights and that he was threatened with the loss of his job if he did not waive his right to assert the Fifth Amendment; (6) that he felt that regardless of what was said it would be used against him in that it would aid the investigation; (7) that he was fired for involvement in two traffic stop violations that he denies he was ever involved in and knows nothing about and

which he gave information to the investigating officer prior to the time that he was implicated as a suspect in those incidents; (8) that there was no competent evidence to prove that he was involved in those incidents and that there is substantial evidence to prove that he was not involved in the incidents and that the Sheriff's Department, in fact, had knowledge of the identity of two persons who look similar to Plaintiff, one of which had a car similar to one identified by the complaining witness; (9) that the booking records found in his residence were not a violation of department rules, that the records were never out of his possession, and that he had a right to their possession and that it was not unusual for correction officers to retain possession of copies of those records; (10) that it cannot be insubordination to refuse to waive Fifth Amendment rights or refuse to answer questions concerning an ongoing criminal investigation where Plaintiff is the subject of that investigation or to give a statement under duress of losing his job; (11) that he had agreed to give the department full particulars of his whereabouts through his attorney, amongst other reasons.

12. Plaintiff did cooperate with investigating officers regarding the alleged incidents until a search warrant was issued to search his house and thus direct adverse proceedings were initiated against him.
13. It was agreed at the administrative

hearing that no information from the criminal investigation would be used at the hearing.

14. The Sheriff's Office records found at Plaintiff's home were located pursuant to a search warrant issued in the course of the criminal investigation. These records were referred to and used at the administrative hearing and was one basis for upholding his dismissal.
15. There was no evidence Plaintiff revealed any official business of the Pima County Sheriff's Office.
16. There is no evidence that Plaintiff divulged any criminal records.
17. There was no evidence that Plaintiff used, utilized, copied, or distributed departmental records for any personal or prohibited purpose.
18. If, by some strained construction of the relevant rules and regulations relating to possession of Pima County Sheriff's Department Jail documents, it is deemed that Plaintiff violated such rules and regulations, the violations do not justify termination.

CONCLUSIONS OF LAW

1. *Cleveland v. Loudermill*, 105 Sup. Ct. 1487 (1985), clearly mandates constitutionally a pre-termination hearing. The issue of retroactivity does not exist since this case was on appeal at the time *Loudermill* was decided. Therefore, the application of *Loudermill* to the instant case is not a retroactive application of that deci-

sion.

2. The "grant of immunity" to the Plaintiff by the Internal Affairs Detective was not valid or effective.
3. The detective had no statutory authority to issue a "grant of immunity." Such authority is given judicial officers only. See A.R.S. Section 13-4064.
4. If one assumes that at a subsequent trial where his statements were sought to be re-used against him, that all those involved testified truthfully, the statements would have undoubtedly been suppressed because they were given in violation of "Miranda" or where involuntarily given, or both.
5. Plaintiff was under no obligation to accept such "immunity" from a clearly incompetent source and be forced to rely upon a Motion to Suppress to bar the use of his statements or any evidence discovered which "flowed from his statements" (the "fruits" of his statements). Such statements could have been used for impeachment purposes at any subsequent criminal trial.
6. Plaintiff may not be fired from his job in compliance with due process of law for exercising his Fifth Amendment rights against self incrimination without a properly authorized grant of immunity.
7. Since Plaintiff did not receive a properly authorized grant of immunity, the decision of the Administrative Appeals Tribunal affirming his termination on this basis must be reversed.

8. The Defendants, in conjunction with the taking of Plaintiff's statement by the Internal Affairs Investigator, refused him his right to counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article II, Section 24, of the Arizona Constitution.
9. Since it was agreed that no information from the criminal investigation would be used at the hearing before the Administrative Hearing Officer, and since the Sheriff's Office records found at Plaintiff's home were located pursuant to a search warrant issued in the course of the criminal investigation, these documents were introduced in violation of the pre-existing agreement.
10. Plaintiff's possession of the documents was not violative of Section 7.01(5); Section 7.02(6) and/or Section 7.05(7) of the Pima County Sheriff's Department Rules and Regulations since there was no evidence that Plaintiff revealed any "official business" of the Pima County Sheriff's Department, or that Plaintiff divulged any criminal records or that Plaintiff used, utilized, converted, copied or distributed for personal use departmental records.
11. Even if some strained construction of these sections might be deemed a violation, it is clearly not such an offense that would justify termination.
12. Plaintiff had a property right in his employment which could not be taken

away from him without due process of law. See Fifth and Fourteenth Amendments to the United States Constitution and Article II, Section 4, of the Arizona Constitution.

13. The fundamentals of due process are reasonable notice and an opportunity to be heard BEFORE loss of rights.
14. The hearing need not have been the full blown adversarial hearing accorded Plaintiff later, but at the minimum, a notice of the reasons for discharge, the reasons for immediate termination, and some reasonable format and opportunity to dispute the accusations before loss of employment should have been provided.
15. The Plaintiff adequately preserved for appeal the due process issues.
16. The Defendants denied Plaintiff his due process rights by failing to provide him with a pre-termination hearing complying with due process.
17. Contrary to Defendants' assertion, the meeting with Deputy Peterson did not constitute a pretermination hearing as contemplated by the United States Supreme Court and its Due Process cases.

JUDGMENT

Plaintiff having timely filed his Appeal from the determination of the Defendant Pima County Merit Commission affirming his termination from employment with Defendant Pima County; the parties having briefed and argued the issues on appeal regarding the Plaintiff's termination; the Court having made the above Findings of Fact and Conclusions of Law and having ruled in favor of the Plaintiff

and against the Defendants, and each of them; the Court having remanded this matter to the Pima County Merit Commission for a determination of damages; the Pima County Merit Commission having awarded Plaintiff back pay, mitigation damages, and interest on the back pay in the total amount of \$59,235.65, this amount, including interest through October 26, 1988; the Plaintiff having filed his Appeal from the refusal of the Pima County Merit Commission to award him additional back pay, mitigation damages, and pre-judgment interest; this Court having considered the memorandums and arguments of counsel and having affirmed the Pima County Merit Commission in regards to its award to the Plaintiff; the Plaintiff having petitioned this Court for an award of attorney's fees and this Court having considered the memorandums and arguments of counsel in regards to this Court's ability to award attorney's fees and this Court having determined that it does not have authority to grant attorney's fees in this action;

IT IS HEREBY ORDERED that Judgment be entered in favor of the Plaintiff, Jason Williams, and against the County of Pima and its sheriff, Clarence Dupnik, in the amount of \$59,235.65, plus post-judgment interest in the amount of ten percent (10%) per annum plus taxable costs in the amount of \$_____.

IT IS FURTHER ORDERED that the Pima County Merit Commission order that Jason Williams be reinstated to his employment with the Pima County Sheriff's Department as a Corrections Officer effective September 30, 1988.

IT IS FURTHER ORDERED, upon stipulation of all parties, through their attorneys, in open Court on September 6, 1988, that, pursuant to Rule 54(b) of the Arizona Rules of Civil Procedure, this Judgment is a final judgment as to all claims which have heretofore been addressed to this Court and there is no just reason for delay and, therefore, this Judgment is appealable immediately.

DATED this 27th day of October, 1988.

/s/ MICHAEL BROWN

The Honorable Michael Brown
Judge, Pima County Superior
Court

APPROVED as to form by:

/s/BARRY COREY

Barry Corey
Attorney for Pima County
Merit System

/s/MICHAEL CALLAHAN

Michael Callahan
Pima County Attorney's Office
Civil Division
Attorneys for Pima County and
Sheriff, Clarence Dupnik

APPENDIX E

PIMA COUNTY
PERSONNEL DEPARTMENT
151 WEST CONGRESS, 4TH FLOOR
TUCSON, ARIZONA 85701
(602) 792-8176

January 27th, 1983

Mr. Michael J. Brady, P.C. (Attorney-Appellant)
Attorney-at-Law
705 Transamerica Building
177 North Church Avenue
Tucson, Arizona 85701

Mr. Mark Christensen (Attorney-Respondent)
Sr. Civil Deputy Co. Atty.
Courts Building, 9th floor
111 West Congress
Tucson, Arizona 85701

Re: APPEAL HEARING - Williams v. Sheriff Dept.

The Pima County Merit System Commission met in Open Meeting on Tuesday, January 25th, 1983. A quorum of Members were present, being: Kermit C. Oestreich, Chairman; Pauline Stringer, Member; Anna Sanchez, Member, and Tom Kleinschmidt, Member. The Appellant and his Attorney, Mr. Michael J. Brady, were also present.

Anna Sanchez, Hearing Officer, advised that the Commission Members have reviewed the Hearing Officer's report presented to them recommending the dismissal of the appeal of Jason H. Williams v. Sheriff Department. Anna Sanchez moved that the appeal be dismissed; Pauline Stringer, seconded; Unanimously passed.

Attorney Michael J. Brady responded to the Commission on behalf of his client, Jason Williams, requesting that the appeal of Mr. Williams be sustained and Mr. Williams be reinstated.

/s/ Gail S. Topolinski
Gail L. Topolinski
Personnel Director

GLT:mp

cc: Commission Members
Barry Corey, Legal Counsel
Honorable Clarence Dupnik, Sheriff
Mr. Jason Williams, Appellant
County Manager
File

APPENDIX F

[PIMA COUNTY MERIT SYSTEM COMMISSION]
HEARING OFFICER'S REPORT

HEARING OFFICER: ANNA SANCHEZ

DATE OF HEARING: October 21st & October 27th, 1982

EMPLOYEE: JASON WILLIAMS

EMPLOYEE'S REPRESENTATIVE: ATTORNEY MAURICE STERN

COUNTY AGENCY: SHERIFF'S DEPARTMENT

COUNTY REPRESENTATIVE: Mark Christensen

Was this appeal within the jurisdiction of the Pima County Merit System Commission (pursuant to the terms of A.R.S. 38-1101 - 1107) or the Law Enforcement Merit Council (pursuant to the terms of A.R.S. 11-351 - 11-356)?

Yes X No

Was there sufficient evidence to justify the specific disciplinary action which was taken in this case?

Yes X No

Was the disciplinary action arbitrary or taken without reasonable cause?

Yes No X

I recommend:

X A. That this appeal be dismissed.

or

 B. That this appeal be sustained and that the disciplinary action be: Revoked: Modified as follows:

I make the following findings of fact: Jason Williams was properly terminated for refusal to cooperate with an Internal Affairs investigation and for improper handling of Department documents.

/s/ Anna Sanchez
(Revised 7-1-81)

A Hearing on Jason Williams vs. Sheriff Department was held on October 21st, 1982, and continued on the afternoon of October 27th, 1982 for the hearing of closing arguments.

The Hearing involved the termination of Mr. Williams, who was employed as a Corrections Officer. Reason for termination was Mr. Williams refusal to cooperate with an internal investigation of two incidents in which Mr. Williams was suspected of being involved. The incidents concerned the stopping of young women on two (2) separate occasions by a man posing as a law enforcement officer. Sheriff's Department records of persons having been arrested for driving while intoxicated were also found in the home of Mr. Williams, and this was cited as a second reason for his termination.

Testimony was given by the following persons:

Mr. Jason Williams

Mr. John Alese, Corrections Manager

Mr. Gary L. Peterson, Sheriff's Deputy

Mr. Dave Heupel, Principal Corrections Officer

Mr. William Richards, Sheriff's Deputy

Before Hearing testimony, Mr. Maurice Stern, Attorney for the Appellant, requested a ruling on his subpoena of the County's criminal investigation file on the Williams case. After much discussion between Mr. Stern and Mr. Mark Christensen, it was agreed that no information from the criminal investigation would be introduced at this hearing, and Mr. Stern's request for access to the criminal file was repealed.

Mr. Jason Williams testified that he was terminated on September 13th, 1982 and that he was aware of the charges for his termination; that he understood them, but did not agree with them. He stated that he had an interview with Mr. Gary Peterson, Internal Affairs Investigator, on September 8th, 1982. This conversation was recorded and Mr. Williams was aware of this fact. (See Exhibit #1, transcript).

Mr. Williams was advised that an internal affairs investigation of his conduct was in progress. Mr. Williams had an attorney at the time of his interview with Mr. Peterson, and when asked questions concerning the investigation, Mr. Williams response repeatedly was that on the advice of his attorney, due to the ongoing criminal investigation, he refused to answer questions concerning the investigation. Mr. Williams did answer questions which didn't concern the investigation. Mr. Williams stated that he had been advised at the time of the interview that he could be dismissed for not answering the questions and he was also told by Mr. Peterson that his statements wouldn't be used in criminal proceedings. Mr. Williams felt that in answering some questions he would be waiving his Fifth Amendment rights. He stated that he didn't feel that Mr. Peterson had the authority to keep his statements from being used in criminal proceedings; although he never questioned Mr. Peterson's authority.

Concerning the Court Order records found in Mr. Williams name (Exhibit 3), as a result of a search warrant, he stated that he had accumulated them during the time he was employed as a Detention Work Program Coordinator. He began receiving the records in November of 1981 and kept some even after he left the program in May. Mr. Williams indicated that the documents in his possession were only "copies" of the original record. He knew of no rules or regulations concerning the taking home of records. He stated that he often worked on his files at home, although he never requested overtime pay for this work. He stated that after he left his DWP job, he discarded many records that were no longer necessary and also took some home in his briefcase to discard and forgot about them.

Five (5) booking slips (Exhibit 4), which contained personal information on persons who had been arrested, as well as pictures of the individuals, were also found in Williams home. These slips are not a matter of public record and are

used in the jail to keep track of prisoners. Mr. Williams stated that many copies of each booking slip are generated, with some being thrown away. Mr. Williams indicated that sometimes these booking slips would fall out of his files and he would put them in his briefcase or pockets and they would end up on his desk at home. He did not work with these documents at home. Several other persons live in the Williams household, including friends, as well as relatives.

Mr. Williams indicated that the disposal of records at the jail is lax. Documents are discarded into the wastebaskets, which are discarded by Trustees into dumpsters outside. These records are thus accessible to inmates, and since there is no fence around the dumpster, persons could pull the documents from the dumpster.

Mr. John Alese, Corrections Manager, has experience as a Corrections Officer. He stated that there was no reason for Mr. Williams to have booking slips available to him outside of working hours. He indicated that some Corrections Officers do work outside of jail hours, but that this happens rarely. It is highly unusual for an employee to work after hours and not be compensated. Mr. Alese indicated that information contained in booking slips is covered by the Privacy Act and should be secured. Mr. Alese indicated that when a document is no longer needed, it should be sent to the archives in prisoner management. Extra copies, or copies with errors, are destroyed and discarded. He has never seen whole records put in the garbage.

Mr. Gary Peterson, Sheriff's Deputy, has been with Internal Affairs for six (6) years. He interviewed Mr. Williams as part of the internal investigation. He stated that he informed both Mr. Williams and his attorney that the interview was for an internal investigation and that information obtained would not be used in criminal proceedings. Mr. Peterson is not involved with criminal investigations, but was aware of a criminal investigation concerning Mr. Williams. Mr. Peterson spoke with other people in

conjunction with the internal affairs investigation of Mr. Williams. He was given information about an inmate at the jail who resembled Mr. Williams, but did not investigate this further because Mr. Carl Daily, a Corrections Supervisor at the Annex, told Mr. Peterson the inmate really didn't look like Mr. Williams. Mr. Stern asked Mr. Peterson if written notice of allegations are given to those persons under investigation. Mr. Peterson indicated that this was not a practice of the department (see Exhibit "A"). However, Mr. Williams had been notified of the investigation in progress. Mr. Peterson was questioned about a slip of paper obtained during the search warrant containing some names and phone numbers. These persons were contacted by a Sergeant Peterson to find out how they were connected to Mr. Williams. Mr. Stern asked Mr. Peterson if he had contacted these people and how he had obtained the names, since this was part of the criminal investigation and not the internal affairs investigation. Mr. Peterson indicated that he had not contacted them. It was a Sergeant Peterson, who is part of the criminal investigation. Mr. Peterson did attempt to contact some people, but was unable to. He did have access to some criminal investigation reports. No written report was made concerning the Internal Investigation. Mr. Peterson indicated that since Mr. Williams had not been read his rights, his testimony in the internal investigation could not be used in a criminal proceedings.

Mr. David Heupel, Principal Corrections Officer, testified that he has worked in booking. He testified that he has seen deputies take home files similar to those taken by Mr. Williams. He indicated that booking slips are freely issued to Corrections Officers and Sheriff's Deputies. He also stated that he and three (3) other persons saw the person who looked like Mr. Williams. He tried to reach several persons concerned with the Williams investigation, finally contacting Mr. Gary Peterson. Mr. Peterson told him he would pass on the information and see that it was checked out. Mr. Heupel indicated that he sometimes takes work

BEST AVAILABLE COPY

home, including jail reports. He sometimes puts in for overtime pay and sometimes not. He knows other Corrections Officers who do the same. He also stated that many booking records go into the garbage where they are accessible to Trustees and others.

Mr. William Richards, Deputy Sheriff, testified that he interviewed Mr. Williams concerning the first stop incident. He took notes and did not tape the conversation. He indicated that Jason cooperated fully, even agreeing to have his car searched. Mr. Williams did not exercise his Fifth Amendment privileges at this time. Mr. Richards was not involved in the internal affairs aspect of the investigation. He notified Mr. Williams when he had completed his investigation and closed his case. He was not satisfied that Mr. Williams was cleared.

Because of the legal issue of Fifth Amendment privilege, the Hearing Officer requested a written memorandum from each Attorney concerning this issue. These memoranda were reviewed by the Merit Commission's legal counsel, Mr. Barry Corey. He also conducted some individual research and advised the Hearing Officer that since Mr. Williams had been told his testimony would not be used in a criminal proceedings, it could not be, nor could any subsequent information which came as a result of this testimony.

It is the determination of the Hearing Officer that Mr. Williams was properly terminated for refusal to cooperate in the Internal Affairs investigation, as outlined in Pima County Sheriff's Department Manual Section 58.01 (B). He also was in violation of Section 7.06 11., as he did not "honestly and accurately report all facts pertaining to an investigation." He refused to give any information at all. By keeping department records at his home, which he did not need as part of his work, he was in violation of Sections 7.01 5; 7.02 6; and 7.05 7, which concern the use and handling of department property. The documents contained private and personal information of private citizens and should have

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been properly secured at all times.

I recommend that this Appeal be dismissed.

/s/ Anna Sanchez
Hearing Officer

APPENDIX G

PIMA COUNTY SHERIFF'S DEPARTMENT

P.O. BOX 910, Tucson, Arizona 85702,

Phone (602) 882-2600

CLARENCE W. DUPNIK, SHERIFF, STANLEY L.
CHESKE, CHIEF DEPUTY

13 September 1982

Mr. Jason Williams

4424 East 15th Street

Tucson, Arizona 85711

RE: NOTICE OF TERMINATION

Dear Mr. Williams:

In accordance with the provisions of Pima County Merit System Rule 12.2(b)(4)(b) your employment with the Pima County Sheriff's Department is terminated effective immediately.

Information received by the Department indicates that you were involved in an incident on May 13, 1982, and a similar incident on August 5, 1982, while on off-duty status. The nature of the incidents are such that they certainly bring disrespect on the Department and may constitute violations of Arizona Revised Statutes.

On September 7, 1982, your attorney was advised by myself that I was ordering you to appear on September 8, 1982, and talk to Internal Affairs concerning an investigation into your conduct. On September 8, 1982, you were advised by Internal Affairs Investigator Gary Peterson that you were expected to cooperate with the investigation into your activities, and answer questions concerning these incidents. Both you and your attorney were advised that you are required to answer questions; that this is an administrative investigation, and any information obtained cannot and will not be used in any criminal proceedings; and your refusal to answer questions may result in your termination. You repeatedly refused to answer any questions related to the

two incidents.

The investigation has also revealed the presence of booking records and other related documents in your residence. These records contain criminal history information. The investigation has revealed information which may indicate questionable activities by you; however, due to your refusal to cooperate in the investigation, we have been unable to evaluate your response to the evidence.

Your actions and inactions constitute violations of Pima County Ordinance 1975-36, Section 17C(5) Insubordination, 17C(11) Discourteous Treatment of Public, 17C(12) Willful Disobedience, Pima County Sheriff's Department Manual Sections 7.01 II(B). 7.01 II(B)(1), 7.02 II(B)(5)(6), 7.05 II(C)(7), 7.06 II(C)(11), 7.07 II(C)(14), and 58.01 I(B).

In accordance with the Provisions of Pima County Merit System Rule 13.5 (copy attached) you may appeal this termination to the Merit System Commission within ten (10) working days.

Sincerely,
Clarence W. Dupnik
Sheriff, Pima County

By: /s/ S. Cheske
Stanley L. Cheske
Chief Deputy

CWD/SLC/jm

cc: Gail Topolinski, Personnel Director
Eugenia Wells, Clerk of the Board

Received this date _____ by _____

Acknowledged Receipt verbally 9-13-82 1504 HRS
Capt. N.M.Davis
Sgt. R.A. Palmer

APPENDIX H

BEFORE THE MERIT COMMISSION

JASON H. WILLIAMS;

Appellant

vs

CLARENCE DUPNIK, Sheriff of Pima County;

Appellee

Jason Williams appeals the Notice of Termination dated 13 September 1982 on the following grounds;

1. that he was deprived of due process of law in that no notice of pending charges was served upon him; that he was not aware of the facts concerning the charges set forth in the Notice of Termination; that no hearing was afforded him; that he was given no opportunity to rebut the charges set forth in the Notice of Termination;
2. that the Sheriff used coercion and threats to obtain a statement from Appellant (i.e. that he would be fired) if he did not cooperate and give a statement, and then fired him based upon the statement he gave to internal affairs;
3. that he was deprived of his rights in that he was not allowed to have his attorney present during the statement before internal affairs;
4. that he was deprived of his rights in that he was threatened with the loss of his job if his attorney remained present during the taking of the statement before internal affairs;
5. that he was threatened with the loss of his job if he did not give a statement concerning matters which were the subject of an ongoing criminal investigation concerning himself;

6. that he was deprived of his rights in that he was threatened with the loss of his job if he did not waive his right to assert the Fifth Amendment;

7. that the promise that the statement would not be used against him is moot since he had already given a statement regarding one of the incidents to Detective Richards, and yet, thereafter, his house was ransacked by Sheriff's Deputies pursuant to a search warrant, and his friends were interrogated endlessly concerning his private life. NO MATTER WHAT WAS SAID. IT WOULD BE USED AGAINST HIM IN THAT IT WOULD AID THE INVESTIGATION.

8. that he was fired for involvement in two traffic stop violations; that he denies he was ever involved in those incidents and knows nothing about them; that he gave full particulars of his whereabouts at the time of the first incident to Detective Richards and was "cleared" of involvement;

9. that he was deprived of his statutory right to a presumption of innocence; that there is no competent evidence to prove he was involved in those incidents and there is substantial evidence to prove that he was NOT involved in the incidents; that the Sheriff's department now has knowledge of the identity of two persons who look similar to Appellant and one of those persons has a car similar to the one identified by the complaining witness in the incident;

10. that the booking records found in his residence was not a violation of Department rules; that the possession of such records was never out of his possession, and that he had a right to their possession; that the records had no value to anyone; that it is a customary practice for Corrections Officers to retain possession of copies of the records;

11. that the Notice of Termination indicated that "The investigation has revealed information which may indicate questionable activities by you..."; that the charge contains no specifics and Appellant cannot answer those charges

because of their ambiguity, and that, without accusations of a specific nature, your Appellant cannot be dismissed;

12. that it cannot be insubordination to refuse to waive Fifth Amendment rights or to refuse to answer questions concerning an ongoing criminal investigation where Appellant is the subject of that criminal investigation or to give a statement under the duress of losing his job;

13. that the grounds of dismissal of "Discourteous Treatment of the Public" can only refer to the traffic stop incidents and Appellant was never involved in those incidents directly or indirectly;

14. THAT THE SHERIFF'S DEPARTMENT REFUSED TO GIVE INFORMATION TO APPELLANT CONCERNING THOSE INCIDENTS WHICH WOULD HAVE ALLOWED APPELLANT THE OPPORTUNITY TO CLEAR HIMSELF;

15. that your Appellant agreed to give the Department full particulars of his whereabouts through his attorney;

16. that the gist of the matter is that Appellant has been fired for being suspected of involvement in a crime which he did not commit and for daring to assert his Constitutional Rights; THERE IS NO PROBABLE CAUSE OR REASONABLE BELIEF THAT APPELLANT WAS INVOLVED IN THE INCIDENTS COMPLAINED OF.

/s/ Jason H. Williams
JASON H. WILLIAMS

Copy delivered to Personnel Office
this 21 day of September 1982

Copy mailed to Sheriff
this 21 day of September 1982

APPENDIX I

LAW OFFICES OF
WILLIAM J. RISNER
100 North Stone, 901
Tucson, Arizona 85701
(602) 622-7494

Kenneth K. Graham
P.C.C. No. 21588
Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

JASON WILLIAMS, a single man,

Plaintiff,

vs.

COUNTY OF PIMA; CLARENCE
DUPNIK and PIMA COUNTY MERIT
SYSTEM COMMISSION,

Defendants.

No. 20697

APPEAL MEMORANDUM

HON. MICHAEL J. BROWN

Plaintiff, by and through his undersigned attorney, hereby submits his Appeal Memorandum in regards to the above captioned matter.

RESPECTFULLY SUBMITTED this 8th day of August, 1986.

LAW OFFICES OF WILLIAM J. RISNER

by: /s/ KENNETH K. GRAHAM
KENNETH K. GRAHAM

Copy of the foregoing
mailed this 8th day of August, 1986, to:

GEOFFREY CHEADLE, ESQ.
Suite 810, Transamerica Bldg.
177 North Church Avenue
Tucson, AZ 85701

BARRY COREY, ESQ.
177 North Church Avenue, Ste. 600
Tucson, Arizona 85701

* * *

REFUSAL TO ANSWER QUESTIONS REGARDING
ONGOING CRIMINAL INVESTIGATION OUTSIDE THE
SCOPE OF MR. WILLIAMS' DUTIES

In *Rivera v. City of Douglas*, 132 Ariz. 177, 644 P.2d 271 (Div. Two, 1982), the court considered whether the City of Douglas could require two employees to take a polygraph examination under threat of dismissal. The two were asked to take the polygraph examinations as a result of information received that they were engaging in personal projects while on City time. Citing, *Lefkowitz v. Turley*, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973), the court recognized that the Fifth Amendment not only protects individuals in criminal prosecutions but also privileges individuals not to

answer official questions put to them in any other proceedings, civil or criminal, formal or informal, where the answers may incriminate them in future criminal proceedings.

The Court then discussed *Garrity v. New Jersey*, 385 U.S. 493 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), (statements which were obtained under threat of dismissal without having been given under a grant of immunity, were inadmissible in subsequent criminal prosecutions); *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967) (lawyer cannot be disbarred for asserting Fifth Amendment privilege, however, concurrence indicating that a public employee who is asked questions specifically, directly and narrowly relating to the performance of his official duties could be terminated if the statements were given under a grant of immunity); *Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968) (a policeman who refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, may be terminated for refusal to answer questions); *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968) (same as *Gardner*, except involving public employees who were not policemen); In *Lefkowitz v. Turley*, *supra*, (testimony of architects under contract to the State can be compelled if it related to the work performed on behalf of the State and neither the testimony nor its fruits are available for use in criminal proceedings. Before finding that, under the circumstances before the court in *Rivera*, the employees could be compelled to take the polygraph examination.

However, the court made a point of emphasizing "the fact that in order to escape Fifth Amendment objections, the proceedings must conform to the notification requirements of *Eshelman* (1) that the questions will relate specifically

and narrowly to the performance of his official duties; (2) that the answers cannot be used against him in any subsequent criminal prosecution; and (3) the penalty for refusing is dismissal."

Eshelman v. Blubaum, 114 Ariz. 376, 560 P.2d 1283 (1977), involved the dismissal of a Deputy Sheriff who had been dismissed for refusing to submit to a polygraph examination. In that case, the dismissed police officer was accused of misconduct involving county property which was possibly misappropriated. The court stated that "the criteria for determining such a test in the course of an internal investigation are that the officer must be informed (1) that the questions will relate specifically and narrowly to the performance of his official duties, (2) that the answers cannot be used against him in any subsequent criminal prosecution, and (3) that the penalty for refusing is dismissal. Citing *Seattle Police Officer Guild v. City of Seattle*, 494 P.2d 485 (1972) and *Dolan v. Kelly*, 348 NYS.2d 478 (1973).

In *Kaalkines v. United States*, 473 F.2d 1391 (U.S. Court of Claims 1973), the court held that where Mr. Kaalkines knew that a criminal investigation was being carried on concurrently with the civil inquiry connected with possible disciplinary proceedings against him, it was reasonable for him to fear that any answer he gave to the customs agents might help to bring a prosecution nearer and that it was sensible to think that the civil and criminal investigations were coordinated, so that the former would help the latter. Under these circumstances the court held that even where Mr. Kaalkines had been informed that his answers would not be used against him, insufficient warning had been given to him since the statements did not "refer to the fruits of the answers (in addition to the answers themselves)."

Applying the principles from these cases to the facts before this court, it is clear that Jason Williams discharge was improper. First, Jason was not informed that the questions would relate specifically and narrowly to the

performance to his official duties as required by *Eshelman, Rivera* and the line of the United States Supreme Court cases. Secondly, although Jason was informed that his answers could not be used against him in criminal proceedings, it was clear that he and his attorney both had concerns as to whether the fact that a criminal investigation was going on at the same time as the internal investigation would result in information being obtained as a result of his answers. Finally, Jason was not informed that he would be terminated if he refused to answer as required by the above cited cases. Rather, as indicated in the interview itself, he was merely informed that he may be terminated if he refused to answer.

Standard of Review. When an issue on an administrative appeal is an interpretation of law by the administrative agency, the trial court and appellate court are free to draw their own legal conclusions and determine whether the agency erred in its interpretation of the law. *Eshelman v. Blubaum, supra*.

Based on the foregoing, Plaintiff respectfully requests that this Court find that the Merit Commission acted arbitrarily and capriciously in affirming Jason Williams' dismissal, and remand this matter to the Merit Commission with directions to reinstate him with back pay to be determined in the second part of this bifurcated proceeding.

RESPECTFULLY SUBMITTED this 8th day of August, 1986.

LAW OFFICES OF WILLIAM J. RISNER

By: /s/ KENNETH K. GRAHAM

KENNETH K. GRAHAM

Attorney for Plaintiff

APPENDIX J

LAW OFFICES OF
WILLIAM J. RISNER
100 North Stone, 901
Tucson, Arizona 85701
(602) 622-7494

Kenneth K. Graham
P.C.C. #21588

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

JASON WILLIAMS, a single man,

Plaintiff,

vs.

COUNTY OF PIMA; CLARENCE
DUPNIK and PIMA COUNTY MERIT
SYSTEM COMMISSION,

Defendants.

No. 206977

SUPPLEMENTAL MEMORANDUM

Permanently assigned to Judge Michael J. Brown

Plaintiff, by and through his undersigned attorney hereby submits a Supplemental Memorandum to his Appeal Memorandum filed August 8, 1986 in the above captioned matter. Plaintiff's counsel inadvertently failed to address

the Due Process issue raised by Plaintiff's counsel in the proceedings below.

RESPECTFULLY SUBMITTED this 14th day of August, 1986.

LAW OFFICES OF WILLIAM J. RISNER

BY: /s/ Kenneth K. Graham
KENNETH K. GRAHAM
Attorney for Plaintiff

A copy of the foregoing was delivered this 14th day of August, 1986 to:

GEOFFREY CHEADLE, Esq.
Suite 810, Transamerica Bldg.
177 N. Church Avenue
Tucson, AZ 85701

and

BARRY COREY, Esq.
177 N. Church Avenue, Suite 600
Tucson, AZ 85701

MEMORANDUM OF POINTS AND AUTHORITIES FACTS

As indicated in Plaintiff's initial Appeal Memorandum, at page 6, Plaintiff's written Notice of Appeal stated as one of the grounds for the appeal that Mr. Williams was deprived of Due Process of law in that no notice of pending charges was served upon him, he was not made aware of the facts concerning the charges set forth in Notice of Termination, no hearing was afforded him and he was given no opportunity to rebut the charges set forth in the Notice of Termination.

The issue of whether a civil service employee is entitled to a pre-termination hearing was conclusively decided in *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985). The Supreme Court in *Loudermill*, held that Due Process requires " 'somekind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment."

In the present case, there is no question that Mr. Williams had a constitutionally protected property interest in his employment. The Merit System Rules and Regulations clearly provide that, after the serving of a probationary period, a county employee can only be discharged for cause.

It is equally clear that Mr. Williams did not receive a pre-termination hearing. Given the fact that there was absolutely no pre-termination hearing, it is not necessary to discuss issues relating to the type of hearing which must be provided prior to termination of a public employee. Since Mr. Williams did not receive a hearing, his termination was violative of his Due Process rights as guaranteed by the United States Constitution, and he must be reinstated.

RESPECTFULLY SUBMITTED this 14th day of August 1986.

LAW OFFICES OF WILLIAM J. RISNER

BY: /s/ Kenneth K. Graham

KENNETH K. GRAHAM

Attorney for Plaintiff

APPENDIX K

LAW OFFICES OF
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Kenneth K. Graham, Esq.
P.C.C. #21588

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

JASON WILLIAMS,

Plaintiff,

vs.

PIMA COUNTY, et al, et ux.,

Defendants.

No. 206977

**RESPONSE TO REPLY MEMORANDUM
OF DEFENDANT PIMA COUNTY**

Assigned to Hon. Michael Brown Div. 9

Jason Williams, by and through his undersigned attorney, hereby files his Response to the Reply Memorandum filed by Defendant Pima County and Clarence Dupnik.

DATED this day of October, 1986.

LAW OFFICES OF WILLIAM J. RISNER

BY: /s/ Kenneth K. Graham
KENNETH K. GRAHAM

Copies to Barry M. Corey, Esq.
600 Transamerica Bldg.
177 N. Church
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Attorney for Defendant
Pima County Merit System Commission

and

Jeffrey G. Cheadle, Jr., Esq.
177 N. Church Ave.
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Tucson, AZ 85701
Attorney for Defendant
Pima County Sheriff and Clarence Dupnik

* * *

should disclose such facts to their superiors and to testify freely concerning such facts when called upon to do so. There is no showing that Mr. Williams had any knowledge of facts which would tend to incriminate any person.

It cannot be overemphasized that, Mr. Williams unlike Mr. Szmardciarz, was being questioned in regards to matters that did not pertain to his duties as a corrections officer.

II

Mr. Williams did not violate Sec. 701 (II)(b) (5), 7.02 (6) and 7.05 (7).

In addition to the arguments set forth in Mr. Williams' Opening Brief, this Court should note that Sec. 7.05 (7) states as follows:

* * *

"Evidence, abandoned and found property, property maintained for safe-keeping, and any other property received by an employee of this department should not be used, utilized, converted, copied, distributed, etc., for personal use or by any employee."

It should be noted that, not only is there no evidence to indicate that Mr. Williams, "utilized, converted, copied, or distributed, etc., for personal use" but further the materials he possessed was not "evidence, abandoned and found property, property maintained for safe-keeping, or other property received by an employee."

III

A pre-termination hearing was legally necessary even in 1982.

Defendant Pima County states that no pre-termination hearing rule existed as it does now pursuant to *Cleveland Board of Education v. Loudermill*, 105 S. Ct. 1487 (1985). This argument presupposes that the *Loudermill* decision constituted a change in the applicable law in regards to deprivation of the property right by a governmental entity. This is simply not the case. The *Loudermill* decision itself points out that except for a plurality decision in *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974), the well established law regarding the government's deprivation of a property right was that it was necessary for there to be a pre-deprivation hearing. See discussion in *Loudermill* at pages 105 S.Ct. at 1491 through 97. Since the *Loudermill* decision does not set forth a "new rule", the State's argument regarding retroactive application of the case is misplaced.

In addition, since Mr. Williams' appeal was still "pending" at the time *Loudermill* was decided, retroactivity of the *Loudermill* decision is not at issue.

Pima County contends that *Loudermill* was complied with since Mr. Williams was confronted with the evidence against him and given an opportunity to explain away the allegations if he wished. This is simply not true. Mr. Williams was never confronted with any evidence against him. Rather, he was asked to respond to questions without having the benefit of knowing what evidence there may or may not have been against him. Due process requires that there be notice and a hearing. Apparently, the County contends that the interview Mr. Williams had with the Internal Affairs investigator was his termination hearing. However, at no time has this interview been referred to as a termination hearing. Certainly, Mr. Williams was not given notice that this was a termination hearing. In fact, unless the County had already made the determination to terminate Mr. Williams prior to the interview by the Internal Affairs investigator, in which case the entire proceedings herein are fraudulent on the County's part, the decision to terminate Mr. Williams was not made until subsequent to his refusal to cooperate by answering questions concerning the ongoing criminal investigation unrelated to his duties. Quite simply, Mr. Williams was not given a pre-termination hearing of any kind.

* * *

APPENDIX L

Kenneth K. Graham, Esq.
P.C.C. No. 21588

IN THE COURT OF APPEALS
STATE OF ARIZONA, DIVISION TWO

JASON WILLIAMS,

Plaintiff/Appellee,
Cross-Appellant,

vs.

PIMA COUNTY; THE PIMA COUNTY
MERIT SYSTEM COMMISSION;
and CLARENCE DUPNIK, Sheriff of Pima County,

Defendants/Appellants,
Cross-Appellees,

NO. 2 CA-CIV 88-0383

(Pima County Superior Court Cause No. 206977)

**JASON WILLIAMS' ANSWERING BRIEF
AND
OPENING BRIEF ON CROSS APPEAL**

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Cross-Appellant

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APPENDIX M

IN THE SUPREME COURT OF THE
STATE OF ARIZONA

JASON WILLIAMS,

Plaintiff/Appellee,
Cross-Appellant,

vs.

PIMA COUNTY; THE PIMA COUNTY
MERIT SYSTEM COMMISSION;
and CLARENCE DUPNIK, Sheriff of
Pima County,

Defendants/Appellants,
Cross-Appellees,

No. 2 CA-CIV 88-0383
(Department B)

PETITION FOR REVIEW BY
THE SUPREME COURT

Kenneth K. Graham, Esq.
RISNER & GRAHAM
100 North Stone
Suite 901
Tucson, AZ 85701
Attorney for Petitioner/
Plaintiff/Appellee/
Cross-Appellant

* * *

the Pima County Jail would have access. *Id.* p. 2.

The Superior Court found that Mr. Williams due process rights had been violated since he did not receive a proper pre-termination hearing. The Superior Court further found that Mr. Williams' Fifth Amendment rights were violated by his termination for refusing to answer questions which were not specifically and narrowly related to his official duties. The Superior Court further found that there was no evidence to support the Merit Commission's finding that Jason Williams had revealed any official business of the Pima County Sheriff's Office, divulged any criminal records, or used, utilized, copied, or distributed departmental records for any personal or prohibited purpose. The Superior Court further found that if, by some strained construction, Mr. Williams was deemed to have violated such rules, the violations did not justify termination. Moreover, the Superior Court found that the agreement to not use information from the criminal investigation at the administrative hearing was violated by the use of the documents found at his home.

Finally, the Superior Court found that Mr. Williams was denied his right to counsel by the exclusion of his attorney from the internal affairs interview. A copy of the trial court's Findings of Fact and Conclusions of Law are included in the Appendix as Exhibit B.

IV. REASONS WHY THIS PETITION SHOULD BE GRANTED

A. Pre-termination Hearing.

No previous Arizona decisions control the point of law regarding what due process should be provided to a public employee prior to his termination. The Court of Appeals resolved this question by stating that due process merely requires notice of the reasons for discharge and some reasonable format and opportunity to dispute the accusa-

tions before termination. The court stated as follows: "In other words, all *Loudermill* requires is an opportunity for an employee to give his side of the story before his employer reaches the decision to fire him."

Mr. Williams respectfully submits that the Court of Appeals' decision that he was provided due process under the facts of this case constitutes the most restrictive reading of a public employee's due process rights to a pre-termination hearing of any court to rule on this issue to this date.

The United States Supreme Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985) held that a tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. Moreover, the very concept of due process requires notice and a hearing. In the case at bar, Mr. Williams was given no notice that the interview with the internal affairs investigator would be considered to be his pre-termination hearing. He was not informed of the evidence against him or provided notice of the charges against him, nor was he given the opportunity to present his side of the story other than his being required to answer questions of the internal affairs investigator. He was never told that he was going to be terminated and given the opportunity to explain why he should not be terminated.

In *Brock v. Roadway Express, Inc.*, 107 S.Ct. 1740 (1987), the Supreme Court considered the question of what procedural due process was required where a terminated employee of a trucking company requested the Department of Labor to reinstate him based on his allegation that he was terminated in retaliation for his previous reporting of unsafe equipment on his vehicle. The Court in *Brock* discussed the question of what constituted a meaningful opportunity to be heard. The Court concluded that minimum due process for the employer in this context requires notice of the employee's allegations, notice of the substance of the rele-

vant supporting evidence, an opportunity to submit a written response and an opportunity to meet with the investigator and present statements from rebuttal witnesses. In arriving at this conclusion, the Court relied upon its previous decision in *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed. 2d 15 (1974) where the Court upheld the procedures for termination of a federal government employee which afforded the employee advance written notice of the reasons for its proposed discharge and the materials on which the notice was based, and the right to respond to the charges, both orally and in writing, including the submission of affidavits.

Mr. Williams respectfully submits that the important issue of law regarding what due process a public employee is entitled to prior to his termination has been incorrectly decided by the Court of Appeals and this court should accept review to correctly state and apply the law. Under the Court of Appeals Opinion in this case, due process is complied with where an employee appears at a mandatory question and answer session, he is not informed of the evidence against him, he is not informed it is his opportunity to be heard, he is not informed of the rules he is alleged to have violated, he is not given notice and an opportunity to respond as to either why he is not guilty of the infraction or why he should not be terminated. This simply cannot be the law in Arizona. The Court of Appeals Opinion must be vacated.

B. Refusal to Answer Questions Which Were
Not Specifically, Directly, and Narrowly
Related to the Performance of His Official
Duties.

In regard to this issue, there are two previous cases which specifically hold that a public employee is not required to answer questions which are not specifically, directly, and narrowly related to the performance of his official duties. See *Rivera v. City of Douglas*, 132 Ariz. 117, 644 P.2d 271 (App. 1982); and *Eshelman v. Blubaum*, 114

Ariz. 376, 560 P.2d 1283 (App. 1977). Moreover, there is a long line of United States Supreme Court cases which arrive at the same conclusion. See e.g., *Gardiner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed. 2d 1982 (1986). The Court of Appeals, without any citation to authority, states that, "In this case, his off-duty conduct was related to his job performance and, therefore, the proper subject of inquiry." Mr. Williams respectfully submits that there is simply no legal or factual basis for excepting this case from the general rule. There is no evidence to indicate that Mr. Williams' job performance was in any way affected by his alleged involvement in the incidents which led to his termination. Illegal conduct of an employee will always be a proper subject of inquiry for a public employer. However, no previous case has found that this fact justifies questioning the public employer regarding the alleged illegal conduct which is not related to his performance of his official duties. Certainly, the public employer should be able to terminate an employee for involvement in criminal activity. However, the public employer should be required to submit evidence of the employee's involvement. The overwhelming weight of authority prohibits the termination of an employee for failure to answer questions which are not specifically, directly and narrowly related to the performance of his official duties.

In addition, both *Eshelman* and *Rivera* require that a public employee be informed that the questions will relate specifically and narrowly to the performance of his official duties. There is no dispute that Mr. Williams was never informed that the questions would relate specifically and narrowly to the performance of his official duties. Yet, the Court of Appeals failed to address this admitted departure from the requirement of *Eshelman* and *Rivera*.

This court should accept review on this issue to make clear that a public employee has a Fifth Amendment right to refuse to answer his public employer's questions which do

not specifically, directly and narrowly relate to the performance of his job duties and that a public employer who wishes to question an employee must notify the employee of this limitation on the appropriate questions. A serious injustice is done when our courts set forth a standard regarding upon what subjects a public employee can be questioned by his employer, an attorney advises his client according to that standard, yet the courts affirm his termination despite the employee's compliance with the announced standard.

APPENDIX N

LEGEND: P = Peterson, Gary
 W = Williams, Jason
 S = Stern (Williams' Atty)

P Ok, I believe that ah, I've discussed the fact with you Jason that I've been directed by the Sheriff to take a statement from you in regards to several incidents that has occurred since your employment with the Pima County Sheriff's Department. I believe your familiar with most of these incidents, ah, one having to do with the serving of a search warrant on you. Some of the items that were found as a result of the search warrant, also in regards to some traffic stops that were allegedly made by an individual, ah, and some jail records that were found. Ok. And it may, as far as I know now, this will be the general outline of the interview. There may be some questions that may lead in a different direction if it leads that way, regarding—depends on your answers of course. I believe we discussed earlier too, in your presence, as well as your attorney's, that Mr. (interrupted)

S Excuse me

P It's Mr. Stern. Was not allowed to be present during the interview. This is per the Sheriff and Rules and Regulations, ok, and at this time I'm gonna ask Mr. Stern to, ah, remove himself from the room. He can be present in the building, wait, or whatever he'd like to do during the interview. It will be your right to either answer the questions. You realize what your refusal to answer the questions may result in. Is this correct?

W Yes.

- P You've been advised, and what's your understanding of your refusing to answer the questions?
- W That I will be fired if I refuse to answer the questions.
- P Ok, and you understand at this time that we are conducting an Internal Affairs investigation, that the questions that will be asked and your answers thereto will not be used against you in any criminal proceedings. Is that correct? You've been advised of that.
- W That's what you have advised me.
- P Ok. And Mr. Stern has been advised of this also, is that correct?
- W Yes, as far as (inaudible).
- P Right, ok. Mr. Stern, ah, like I say, we're going to ask you to leave the room at this time. If you have any comment, ah, now's the time, before we begin the statement.
- S Ah, it may be that the rules of the Sheriff's Department or the order of the Sheriff, ah, prohibits me from being here. It's Jason's belief and mine too, that I have a right to be here. Not to interfere with the investigation whatsoever. Ah, that which you have referred to as two traffic stops, or in fact not traffic stops, ah, from the information I have found from reading the affidavits or the search warrant, ah, there was some rather serious matters,
- P Ah, huh.
- S we're not just talking about traffic stops here, we're talking about assault, aggravated assault, ah, perhaps ah some situation impersonating an officer that perhaps has more power than Jason does. Perhaps, it's interesting to note that the traffic stop, what you call traffic stop and what I call assault, that investigation is being handled by the Sex Crime Division of the Sheriff's Department. So what I'm talking about, a simple

automotive, you know, vehicle matter here, now, ah, it seems to me that the way the investigation has been handled so far, that ah, the entire investigation here, Internal Affairs Investigation, is being handled in order to produce evidence for the criminal investigation. It seems to me that the criminal investigation may have come up a dead end at this particular point, and this is the only way, perhaps, that further information can come. So Jason is now being put in a position of having a trade off, that is being stripped of his constitutional rights, ah, at the same time being ordered, you know, to answer the questions that the, ah, perhaps losing his job. I would call your attention to the format which you just, did show me, that despite what you just said that his ah, any answers he may be given here would not be used against him, I think it's paragraph #16, indicates that it may be even though you may not answer it is on your format, you see, so it's another red flag that we (interrupted)

P I think I indicated I wasn't going to 16 if you recall Mr. Stern, I said I'd go down to questions number 11 or 12,

S Well, ah you probably said that.

P Ok.

S and, ah, so, I think I should be here, ah, ah, but I will remove myself because ah, I can (interrupted)

P You understand (interrupted)

S the rules of the Sheriff's department.

P You have a, it's my understanding you've had a chance to discuss this with Jason to some extent what the statement might entail, and

S Yes.

P ah, I've advised you that Jason can answer or not as he see's fit. However,

S Yes.

- P he understands the consequences of his refusing to cooperate or answer
- S Precisely!
- P Ok
- S That's just my point as to why (interrupted)
- P And having been advised that, ah, they will not be used against him in a criminal proceedings, he understands that his constitutional right, rights, can't be waived by doing that.
- S I disagree (interrupted)
- P The only thing that can be waived was if they were going to be used against him in a criminal proceedings.
- S I understand what you've just told me (interrupted).
- P They can be used against him in an administrative proceeding.
- S Right.
- P And I'm not going to try to hide that,
- S Ok
- P if, if there's something that, that comes out of this here interview, ah, it would be detrimental to his employment, it probably would be used, in a merit system hearing, or whatever else may take place at some future time. I'm not saying that anything is gonna take place, I don't know at this point.
- S The administration of the Sheriff's Department, ah, or the Sheriff It's
- P The prerogative of the Sheriff.
- S It is the prerogative of the Sheriff, I recognize that and I understand and have instructed Jason to answer questions that would, is properly within the Sheriff's function, you know, and the running of this department, even though it may be detrimental to Jason. He understands that he must answer those questions, and

I have so instructed him, so there will be no attempt whatsoever by Jason not to answer anything, except the ongoing criminal investigation.

P Well, you understand I'm not conducting the ongoing criminal investigation matter. I'm doing an internal investigation that may run parallel and be of the same magnitude, or it may even be of the same nature, but I'm not doing the criminal investigation, I'm doing an administrative investigation only. Not criminal.

S I understand what you told me. I think you're a man of good faith, and I believe that what you just told me is the truth; however, this matter may be taken out of your hands by others, and, ah, as to that, I believe Jason's rights would be stripped from him answering anything that has to do with ongoing criminal investigation. And that's the reason that he may not answer those particular questions, but anything else where I think the Sheriff has a right to know, and Jason has a duty to tell him even though it's detrimental to him.

P Right. We can let it stand there, and I can say if, if Jason understanding his refusal to answer, ah, and go from there and make up his own determination at that point.

S Ah, I would ask that you (interrupted)

P The Sheriff will decide later (interrupted)

(Atty turning his tape around. S: Did you bring the others too? Ok.)

P The Sheriff will decide later what his refusal means, and what action will be taken. That's not up to me.

S We understand that. He's got that certain right to do that, and must do it.

P But I have advised him that he is required to answer according to the rules and regulations.

S Yes. Now, I would ask that ah, I'm gonna wait outside the door, and, ah, I can ask Jason that if there's any question that's asked to him that he is not sure of

whether or not he should answer that, because of my prior admonitions, that he ask you for permission to talk to me about that one question, (interrupted)

P Probably won't give him that right. I can tell you now, because I'm not gonna be limiting him to the questions I can ask or the ones that he might think he shouldn't answer. He can, if he himself thinks he shouldn't answer them, he's got that right.

S I understand that.

P Like I say, I can't stop him, he understands the consequences of his refusal.

S It's my understanding that Jason does have the right to an attorney in these matters, and if you ask him a question, and he's asked you for permission to ask me about the one particular question, and you refuse him that right,

P He can probably

S He will not answer that question. Although he may answer it, at my instruction, if he's given the permission to ask me that. So I would ask that you depart from that.

P Well, I can't really depart from that because I don't have the leeway to depart from that. Like I say, ah, I can't you know, be interrupting the interview and going back and forth, and ah letting him decide what questions he wants to answer, and what ones he doesn't. He can make that determination as they come up. And if he sees fit, ah, he knows the consequences of refusal.

S I'd like to make one other comment here, and they I'll get out of your hair, and wait outside.

P Fine.

S Ah, it's my feeling, based upon the . . . tape if possible, that what the second, what you call traffic stop incident, had, ah, there was no attempt made to cooperate by the Sheriff's Department with one of their employees. Ah,

what the Sheriff's Department did at that particular point was to react instantaneously with a search warrant. Now, Jason has already cooperated concerning the first incident. He told Detective Richards a number of times, everything he knows about it, and, ah, I'm telling you for the purposes of the tape here, that he would have done so in this particular incident as well. By going ahead with the search warrant, the Sheriff's Department has put themselves in an adversary position, ah, what Jason and members of his family, you know, concerning those matters, and he feels that he is in an adversary position therefore, what he feels is that the, the refusal to answer any questions, whether his constitutional rights will be stripped from him, will be used as an excuse for his discharge, because the Sheriff's Department does not wish to keep an employee who is under investigation of crime. And we, ah, that's the reason, that ah, you know, I would prefer to be here during the questioning, that I would be _____ to if I have Jason—be available to Jason should he wish to ask any questions. With that, I'm gonna get out of here, out of your hair.

P Fine. Ok. Thank you.

S Thank you.

P I think we fairly well understand each other about the matter. At least I do, ah, I think you understand my position.

S Yes I do.

P Ok. I believe you've been told by me and led to believe this by the Sheriff, both. Is that correct?

W Yeah.

P And your attorney has been told also. Ok, with that in mind, we'll go ahead and get started with the statement. You understand that your refusal to answer questions, ah, can lead your, to your termination, possibly?

W Yes I do.

APPENDIX O

THE FOLLOWING WILL BE A STATEMENT OF JASON H. WILLIAMS, #1713, AS GIVEN TO DETECTIVE GARY L PETERSON, #237, AT THE PIMA COUNTY SHERIFF'S DEPARTMENT, 1801 S. MISSION ROAD, TUCSON, ARIZONA, ON 8 SEPTEMBER 1982 AT 0904 HOURS. THIS STATEMENT WILL BE IN REGARDS TO AN INTERNAL AFFAIRS INVESTIGATION.

LEGEND: P=Peterson, Gary
W=Williams, Jason H.

- P Jason, do you realize that the statement you are about to give is being recorded, and may at a later date be reduced to writing?
- W Yes, I do.
- P Please state you full name?
- W Jason H. Williams.
- P What is your address?
- W 4424 E. 15th Street, Tucson, Arizona.
- P What is your telephone number?
- W 327-1857
- P What is your date of birth and place of birth?
- W I was born on June 8, 1960, in Tucson, Arizona.
- P What is your age at present?
- W Twenty-two.
- P What is your social security number?
- W 526-39-0394.
- P What is your occupation?
- W I am a Corrections Officer.
- P And for whom are you so employed?
- W Pima County Jail.
- P Ok, that's part of the Pima County Sheriff's Department, is it Jason?

W Yes, it is.

P Ok, how long have you been so employed there?

W Almost three years.

P Ok, and in regards to your employment at the Pima County Jail, what is your title at that place?

W Senior Corrections Officer.

P Ok, are you assigned any particular tasks or section of the jail?

W Booking and I.D.

P Ok. Now calling your attention to the date of May 13, 1982, were you on that particular date employed by the Pima County Sheriff's Department at the jail?

W Yes.

P Ok. I realize I'm going to be asking you some fairly difficult questions it may, may take you some time for recollection. If you need time, just go ahead and say so. Have you had a chance to think back on that particular date as to what your activities might have been? For any reason.

W Yeah.

P You have? Ok. Ah, on that particular date, an, could you just briefly give me what you recall as to your activities on that date. Did you work on that date by the way?

W Yes.

P Ok. What, what was your shift on that particular day?

W It was the day shift.

P Ok. What hours did that entail if you recall?

W At this point I'd just like to say that under my attorney's advisement, due to the ongoing criminal investigation that's occurring, that I think I'm gonna have to refuse to answer these questions, this question.

P Ok. Ah. Let me ask you this Jason, on that particular

date, did you have an occasion to be on the Catalina Highway in the vicinity Tres Lomas Drive?

W Under my attorney's advisement for the same reason of the ongoing criminal investigation, I think I'm gonna have to refuse to answer that question, too.

P On that particular date, do you recall the type of vehicle, you—your personal vehicle you were driving?

W Yes.

P Ok. What type of vehicle were you driving?

W A 78 Dodge Aspen.

P What is the color and plate number, if you recall?

W It's blue, dark blue, with plate AWA284.

P Do you ever drive any other type of vehicle, besides that one?

W Yes.

P What other type of vehicle do you drive?

W Ah, a 78 Kawazaki, KZ650, 650cc motorcycle, and a Mazda GLC 2-door.

P Have you ever had occasion to either be in or ride in a Chevrolet?

W Ah, due to my attorney's advisement I think I'm gonna have to refuse to answer that question, too.

P On that particular date, did you have an occasion to stop another vehicle while you were on a vehicle on Catalina Highway near Tres Lomas Drive?

W Under my attorney's advisement, I think I'm gonna have to refuse to answer that question.

P On that particular day, did you have an occasion to smash or break a driver's door window on a another veh—person's motor vehicle?

W Under my attorney's advisement, I'm gonna refuse to answer that question, too.

P On that particular date, and again we're referring to

May 13, 1982, did you have an occasion to be at the Cowboys, which is a, I believe a night spot on the eastside on Wilmot Road?

W Under my attorney's advisement, I believe I'm gonna refuse to answer that question.

P On May 13, 1982, do you have anyone that can verify your whereabouts at approximately 0115 hours, that would be 1:15 a.m. in the morning?

W I, under my attorney's advisement, I'm gonna refuse to answer that question.

P Do you know an individual by the name of Robin Oda, O-d-a?

W Yes, I do.

P What, what, how do you happen to know this individual?

W Well, he's presently my brother-in-law.

P On the evening of May 11, 1982. Correction, I should make that May 12, 1982, were you in a vehicle with your brother-in-law?

W Ah, due to my attorney's advisement, I think I'm gonna refuse to answer that question.

P Let me ask you this Jason, ah, on August 5, 1982, do you recall what your schedule was on that particular date, what you were doing? First of all, let me ask you were you working on that date?

W No.

P You weren't working?

W No. Would, would, you repeat the date please?

P That was August 5, 1982.

W No.

P Ok. That was an off-duty day?

W Yeah.

P Did you have an occasion on that particular date to be

traveling in the vicinity of Knollwood and Knollwood Circle in Tucson?

- W Under my attorney's advisement, I'm gonna refuse to answer that question.
- P On any of the motor vehicles that you've driven during the past year, we're talking about 1982, has any of them had an apparatus installed on it that would cause the headlights to flash in a wig-wag fashion? Are you familiar with what I'm talking about?
- W Well would you go ahead and describe it?
- P Where the headlights flash alternating on the front of the motor vehicle. This is actuated by a switch or some type of external device to, ah, start the headlights in this fashion.
- W Under my attorney's advisement, I'm gonna refuse to answer that question.
- P Have you ever sprayed an individual outside of your on-duty work with some type of chemical mace or other type of chemical from a canister?
- W Under my attorney's advisement I'm going to refuse to answer that question.
- P Let me ask you this Jason, are you right- or left-handed?
- W I'm left-handed.
- P On August 5, 1982, do you have somebody that can verify your location at approximately the hour of 0200 or 0230 hours?
- W Under my attorney's advisement, I'm gonna refuse to answer that question.
- P On August 5, 1982, in vicinity of Knollwood and Knollwood Circle, did you have an occasion to break the driver's door window of a motor vehicle belonging to another individual.
- W Under my attorney's advisement, I refuse to answer that question.

P Do you know anyone that lives in the vicinity of Knollwood and Knollwood Circle?

W Under my attorney's advisement, I refuse to answer that question.

P Again, just to refresh your purposes, you realize the consequences of your refusal to answer our questions?

W Yes, I do.

P An what's your understanding of your refusal to answer our questions?

W That I may be fired.

P Ok. We'll continue. Do you have any other outside employment other than with the Pima County Sheriff's Department, Jason?

W No, not now.

P Let me rephrase it a little different. Have you had other outside employment while being employed by the Pima County Sheriff's department.

W Yes.

P Where at?

W South Tucson Police Department.

P And, in, what was your position with the South Tucson Police Department?

W Ah, Detention Officer and On-Call Dispatcher.

P Ok. As a result of having obtained this employment, did you get permission, either verbally or written, from any member of the Pima County Sheriff's Department to do this?

W Yes.

P An who did you obtain this permission from?

W Shift Commander Heupel.

P Ok. Was it, do you know, was this cleared through the facility commander, Mr. Ferguson? Was he here at that time?

- W Yes.
- P Ok. Do you know if it was cleared through Mr. Ferguson?
- W Mr. Ferguson was made aware of it.
- P In what manner?
- W Verbally,
- P Ok. You were present when he was made aware of it?
- W It was over the telephone.
- P And it was approved?
- W He made no mention that it wasn't.
- P You realize that you have to have permission to obtain outside employment before you can, ah, with another governmental agency?
- W Yes.
- P From the Sheriff of Facility, I'm not sure if it's a facility commander, but it has to be approved by the Sheriff.
- W Ok.
- P Are you aware of that?
- W No.
- P Ok, Jason, ah, on Monday, August 30, 1982, at approximately 0600 hours, do you recall if you were working at that date and time?
- W No, I wasn't.
- P Do you recall, what your, what you were doing in that particular date and time?
- W August 30th. May I check your calendar, please?
- P Sure, go right ahead, ah.
- W Do you have a calendar I can check?
- P Yes, let me refer you to a calendar on my desk here, you go right ahead and help yourself to that. This is September, here.
- W August 30th would have been this here.
- P Right here is August here.

W It would have been Monday. The previous Monday. yes, I know where I was.

P Ok, let me ask you this then. On that particular date, did you make a telephone call, commonly referred to as an obscene telephone call to an individual?

W No.

P Ok, Jason is it true that there was a search warrant served on, on your residence, ah, here just recently?

W Go ahead.

P Well, is it true that there was a search warrant served by somebody from the Pima County Sheriff's Department on your residence recently?

W Yes.

P Do you recall that date of the service of that search warrant?

W August 13th I believe.

P Were certain items taken from your residence on that date?

W That's what I was told.

P Let me show you an exhibit here of a photograph, Jason, and ask you if you recognize this picture?

W No. I've never seen that picture before.

P What does that picture depict?

W It looked like (END OF SIDE 1)

SIDE 2

P Repeating my last question, Jason, I believe you observed the tape just ran out in one side of my recorder. I just asked you to observe a photograph, and you indicated it depict some lock picks, is that correct?

W It looks like lock picks.

- W I don't know.
- P Do you have a set of lock picks that are similar to this, or look like this?
- W I did.
- P You did? Ok. Ah, can you tell me the purpose of those lock picks?
- W What do you mean by the purpose of them?
- P Well, are you employed as a locksmith, or in some capacity with some agency or outfit that would require you to possess lock picks?
- W No.
- P Ok. Ah, where did you obtain these lock picks?
- W Explaining about the lock picks, I've had them since I was about 14 or 15. And I obtained them through the mail.
- P Mail order type, through a magazine or?
- W Yes.
- P Ok. Any particular reason, ah,
- W I wanted to study about locks—locksmithing.
- P Ok, did, did you study about locksmithing?
- W No.
- P Ok, any particular reason why you still have them, or just as a memento, or keepsake, or?
- W I'm a pack rat. I have things that, ah, when I was a little kid that I still have, I just somewhere in the house they're there, and that's what happened to those. To me, they just stayed there, I didn't you know, throw them away, I had no place to put them, so they just stayed there.
- P Do you own or have in your possession of what is commonly referred to as chemical mace in a container?
- W No.
- P Ok. Do you, I'm showing you a picture at this time, is

that _____ of a chemical mace container, ah, looks like a typical police chemical mace type of unit, is that correct?

W That's what it looks like.

P Did you have occasion to have in your possession this item, when the search warrant was served on your residence?

W I can't say it's that item.

P Did you have one similar or like it?

W Yes.

P Ok. And how did you happen to be in possession of that?

W Well, some friends of mine, one of whom was a T.P.D. officer, had left town the previous weekend, and they had requested me to watch some of their things which included that. It included he-her duty rig which included the mace, and I took that to my house and watched them for the week until they got back.

P Ok. Who was the T.P.D. Officer?

W Her name is Pat Walters.

P Is she presently employed at the Tucson Police Department?

W She was the last time I knew.

P Ok. You said this and other items. What other items are you talking about?

W Ah, some firearms, some holsters.

P Show you a photograph of the vehicle, Jason. Does this, this photograph look familiar of this vehicle?

W I've never seen the photograph before.

P Does this vehicle look familiar in the photograph?

W Yes.

P Ok. Showing you a closer up of the license plate number, ah, does that plate number look familiar?

W Yes.

- P Ok. Whose vehicle is this?
- W I believe it's mine.
- P Are you sure, or, from the plate number?
- W The plate number is mine.
- P [unintelligible]
- W Yes.
- P Ok. And that is your vehicle?
- W Yes.
- P What type of vehicle is that?
- W A 1978 Dodge Aspen.
- P Ok, how long have you owned that vehicle, Jason?
- W Since about February.
- P Ok, where did you obtain it from?
- W I obtained it from a co-worker.
- P Who was the co-worker?
- W Charles Royals.
- P Ok. Do you know if that used to be a former Pima County Sheriff's Department vehicle?
- W That's what he told me.
- P And he had purchased it from somebody from Pima County?
- W Yes.
- P So that's, is that similar to vehicles presently being driven by Pima County Sheriff's Department?
- W I believe so.
- P Does that particular vehicle have an apparatus on it that would cause the headlights to alternate in a wig-wag fashion?
- W I believe that under my attorney's advisement due to the ongoing criminal investigation, I'm going to have to refuse to answer that question?

- P let me ask you another question. Has that vehicle ever had an apparatus on it that would cause the headlights to wig-wag in an alternating fashion?
- W I don't know.
- P Since you've owned it? Clarify it that way.
- W Under my attorney's advisement, due to the ongoing criminal investigation, I'm gonna have to refuse to answer that question?
- P Is this part, let me show you a photograph here of a, looks like police leather, it's a gun rig with mace on it from a weapon. Do you recognize that?
- W What do you mean, do I recognize that?
- P Do you know whose it is?
- W No, I don't. I can't say from this photo.
- P Ok. Did you have one similar to that, or one that looked like that in your residence when the search warrant was served on it?
- W Yes.
- P Ok. And whose was that?
- W That belonged to the T.P.D. Officer.
- P That's the one we were previously discussing?
- W Yes. Pat Walters.
- P Ok. Showing you some pictures here, Jason, do you recog—these are pictures of firearms if I'm correct, and you can correct me if I'm wrong, is that correct?
- W Yes.
- P Ok. do you have firearms that look similar to these?
- W Yes.
- P Ok. How may firearms do you own?
- W Ah, about 11. Approximately 11.
- P Are some of these firearms, in fact several of them, of a military type, except that they're not fully automatic?

- W That is correct.
- P Is this a hobby of yours?
- W Yes.
- P Do you recall where you obtained these firearms?
- W Yes.
- P Ok. Just going back, why don't you tell me where you've obtained them?
- W Which one.
- P Well, which one, just go over the ones you own.
- W Ok.
- P Which, one look
- W Why don't you just show me the pictures and I'll tell you where I got them from, Ok?
- P Ok. We have one here that looks like it might be a MAC 10, is that correct?
- W Yes.
- P Ok. Where was that purchased?
- W At the swap meet.
- P Ok. Do you know who, who you purchased it from?
- W I don't know the gentleman's name, but I knew where he worked.
- P Where did he work?
- W Ah, The Shootist.
- P And that's a, ah, a Shootist is a, ah, a Sporting Goods Shop?
- W Yes.
- P Ok. did he give you a receipt for it?
- W No.
- P He didn't. Is that unusual that you wouldn't obtain a receipt?
- W Sometimes.

- P Ok. What is this weapon here shown, shown in a case?
- W That looks like a _____.
- P Ok.
- W A _____ Carvey.
- P Where, where did you obtain that weapon at?
- W From Carson's Sporting Goods.
- P [unintelligible]
- W Yes.
- P When did you purchase that weapon?
- W Ah, last year.
- P 1981?
- W Yes.
- P Ok. Do you recall who you dealt with at the time?
- W Ah, Mr. Carson.
- P Ok. How about this weapon outside the case laying at the bottom in this photograph?
- W That doesn't look like a weapon.
- P Correct me if I'm wrong, what is that then?
- W That looks like a stock.
- P That's just the stock, the rest of the weapon is not present?
- W That's right.
- P Ok. What does that stock belong to?
- W It looks like that stock belongs to a mini-14.
- P Ok. Do you have a mini-14?
- W Yes, I do.
- P Ok. do you recall where you purchased that from?
- W From a C.O.
- P Which C.O.?
- W Jeff Cutlett.
- P Is he presently employed by the Pima County Sheriff's

Department?

W I really don't know at this point.

P Ok. Did you get a receipt for that weapon?

W No.

P When did you obtain that weapon?

W Approximately 2 1/2 years ago.

P [unintelligible]

W That looks like a AR-15.

P Ok. Do you own an AR-15?

W Yes, I do.

P Ok. Where did you obtain that weapon from?

W I obtained it from, oh, one of the people over the jail.

P And who was that?

W John Alese.

P Ok. Did you get a receipt for that weapon?

W Yes, I did.

P When did you purchase it?

W Ah, earlier this year.

P Ok. Showing you this photograph, ah, what does that depict?

W That looks like an

P Ok. Is that the same one we referred to in the other picture?

W Yes.

P Ok. And this is the same Mac10 that we referred to earlier?

W That's not a Mac10.

P What is that?

W That looks like an SM11.

P That's an SM11. Do you own an SM11?

W Yes, I do.

P Where did you purchase that at?

W That is the same one depicted in the previous picture, I believe.

P Ok.

W I only own one.

P Just one. Ok, when the search warrant was served, also on the residence, Jason, a UCC Guide was found, ok. Do you know what a UCC Guide is? Uniform Classification Code Guide?

W Yeah.

P You know, the classified police reports.

W Yes.

P Your familiar with those? You have the name of J. Godfrey on it. Do you know where you obtained that at?

W That was going to be thrown away from one of the drawers at the jail.

P Ok, whereabouts in the jail had it been located at?

W In the floor office.

P The floor office. And you came into possession of it when it was being thrown away?

W When it was going to be thrown away, yes.

P Do you know who was throwing it away?

W Some people were cleaning it out.

P Who were these people?

W Ah, just jailers.

P You don't know the names at this time? Who they were.

W Not really.

P Ok. This item did have a name on it. Is that correct?

W Yeah.

P Do you know who Godfrey is?

W I have no idea.

- P Did you attempt to find out who Godfrey is?
- W No.
- P Do you know if he's a Deputy with the Pima County Sheriff's Department?
- W No, I don't.
- P Or, if it was his personal property?
- W I really no idea.
- P Did you attempt to find out?
- W No, not really. It had been there for several months.
- P Ok. You say you know an individual by the name of Robin Oda?
- W Yes.
- P Ok, what, what was his relationship....?
- W He is presently my brother-in-law.
- P He's your brother-in-law. Does he live at your residence?
- W No, not now.
- P Did he live at your residence when the search warrant was served?
- W Yes.
- P Ok. Does he own an onyx pipe?
- W I don't know.
- P Ok. An onyx pipe was found in the search warrant, if I tell you that. Do you recall ever having seen him with an onyx pipe?
- W No.
- P Also found in the residence, and not in his room, was a black bong. Do you know what a bong is?
- W Yes.
- P Ok. What's your understanding of a bong?
- W It's a water pipe.

- P Used for what purpose normally?
- W Smoking.
- P Of what?
- W I've seen them used for smoking marijuana.
- P Ok. Who does this black bong belong to?
- W I don't know.
- P It's not yours?
- W No.
- P Have you ever had possession of it?
- W No.
- P If your prints were to have been found on it, how would you explain that?
- W I might have seen it, picked it up. There are a lot of things in my house. Like I've said, the whole family is pack rat, basically.
- P How about two Motorola HT200 portable radios. Do you own two of those?
- W Yes.
- P Ok. How did you happen to obtain those?
- W I bought those.
- P Here in Tucson.
- W Yes.
- P Well, where at?
- W Catalina Communications.
- P Ok. Ah, is this a hobby also?
- W Yes. The radios interested me.
- P Ok. Are they on any particular frequency?
- W Ah, there on the business band.
- P How about two, I believe they're pronounced Yacci mobile radios?
- W Ya-su.

- P Ya-ci. How was that again?
- W Ya-su.
- P Ya-su. Ok, I was misreading the word. Do you own two of those?
- W Ya-su what?
- P Radios. Mobile radios.
- W Yes.
- P And that's part of your hobby also.
- W Yeah.
- P Ok. What frequencies are they on?
- W None. no, no crystals in them.
- P Ok. Going back to the two incidents that I have described for you [unintelligible].
- P Knollwood and Knollwood Circle, and another at another location, how would you explain that you were identified as being present at those two particular locations?
- W Under my attorney's advisement I'm gonna refuse to answer that question due to the ongoing criminal investigation.
- P Ok. Do you know someone that owns a 1977 Chevrolet, Nova, white in color.
- W Under my attorney's advisement I think I'm gonna refuse to answer that question.
- P Do you know an individual by the name of Patty Hunter?
- W Yes.
- P Ok. How do you happen to know Patty?
- W She's the girlfriend of a friend of mine.
- P Does she own a 1977 Chevrolet Nova, white?
- W I'm not sure.
- P Have you ever seen her with one?
- W Ah, I can't say. I'm not much good at cars.

P Does she own a white vehicle?

W Yes.

P Ok. You're not familiar with the different makes and models of cars?

W Not really.

P This time Jason, I'm going to show you some, some records, and I ask you if you recognize these records.

P If you would care to look at these here and see if you recognize them?

W Yes.

P Ok. Where did, these records were found in your residence when the search warrant was served. Can you explain how these records happened to come into being in your residence at that time?

W Yes.

P Go ahead.

W Well, at one point. I was running what was known as the Work Detention Program, and those records were a part of it. Those records that you handed me right there are called booking slips. Ok. These slips are loose inside the folders themselves. And, as a result, because the people serve only short term time, normally those records would go to the floor, where the floor would keep a copy, that copy of the records. And once the subject was discharged from our custody, the record would be thrown away. Normally because these people didn't really enter the jail facility, they can go to the floor. _____ stayed in the folder and went with me.

Went to me. Well they were constantly falling out, so if there was a garbage pail near, I'd toss them in the garbage pail. If my briefcase was near, I'd toss them in my brief case. If my pocket was near, I'd stick them in my pocket. Whatever was available. And then when I went home at night, I'd just emptied out my pockets wherever I was. Ah, these records are thrown away,

once they're done. That, that particular slip right there is tossed away, and it becomes garbage once the person has served time.

P Ok. Whereabouts did you keep these records in your residence?

W Wherever.

P Just laying around.

W Just laying around. It could have been in my room (interrupted)

P Do you realize that these are privilege records, and that no one else should have access to these records, except the employee himself that has reason to deal with them?

W That record (interrupted)

P That these records, that these records are people's names, home addresses, phone numbers, friends, physical descriptions, and so forth.

W Yeah.

P And that nobody else should be in possession of them, except those that have a need to know?

W That may very well be.

P Is there anybody else in your residence that could of had access to these and saw these?

W There's a possibility.

P Then ah,

W I'd like to state, that they become garbage once they're done with it, anybody who walks by the dumpster at work can take them if they want them.

P They are physically destroyed, are they not?

W No. They are tossed in the garbage.

P Do you realize that by tossing them in the garbage that's a violation of security at the Pima County Jail?

W That's a possibility.

P And that by your having them in your possession, that's a violation of security, at the Pima Cou—at your residence?

W I don't know.

P Do you realize that you're not allowed to have any jail records in your possession whatsoever for your personal possession?

W No.

P If I can refresh your memory. "Evidence abandoned and found property, property maintained for safekeeping, and any other property received by an employee of this department shall not be used, utilized, converted, copied, distributed, etc., for personal use by an employee." These are copies is that correct, or originals, or in some cases are, they are originals of photographs?

W Yeah.

P And you had them in your possession. Is that correct?

W Yes.

P Which is the violation of the rules and regulations?

W I can't say that.

P Did, well I just read it to you. Is that correct? Does that not say that you're not allowed to have them for personal use?

W I did not have them for personal use. They weren't intended.

P Right, but they weren't in possession of the Pima County Jail, they were in your possession. And you don't use these records at your home?

W No.

P Let me show you another record here. This one being of a arrest/information sheet which depicts, I believe an original, if you will examine that and tell me. How did that happen to be in your possession?

- W Well, this is part of the Work Detention Program. The Detention Work Program. It says rights here _____ serve three days D.W.P. What it was, was this gentleman had come in about three weeks prior and had been booked already. When he came in again, somebody went ahead and booked him which really wasn't, shouldn't have happened. So there were now two existing records of the man. When I came in, like this occurred on a weekend, when I came in on a Monday morning, I took it to Prisoner Management, both copies of the record, and says the man now has two records. He tossed the one record on my desk and he said, I _____ the other record, and this is the original record. This is his good record. And then he tossed this record at me, and said you can do whatever you want with that, that's no good, that's not his legitimate record.
- P Ok, let me ask you this. When a person is rebooked to serve time, is the, are you familiar with the booking procedures?
- W Yes.
- P Do you work in the Booking Section, is that correct?
- W Yeah.
- P Is this information entered into a computer?
- W yes.
- P Would you examine this computer printout and explain to me why that particular entry is not entered into the computer printout that I just received ont his individual?
- W Which one.
- P This rebooking was served three days.
- W Because that is not his official booking record. That is the second record that was taken out of the computer because it was no good, because he shouldn't have been booked twice. That record is garbage.

- P Ok. Where was the first booking at on that printout for that same thing that you're referring to then if he was booked twice?
- W What do you mean, "Where was that."?
- P Where is the, you said he was booked twice, then the first entry should have been on that record also, right?
- W Right here, if you'd look at the numbers.
- P Yeah, but that's sixty days. That's not the same booking.
- W Yeah, It is the same booking. Somebody made a mistake on his record. This is the same gentleman, and if you'd look,
- P Right.
- W If you can go and pull this file from records, you will find a court order that had been _____ of information. Somebody did not pay attention when they did this. This, if you would look
- P So that's a mistake.
- W This is a total mistake. This record was a mistake. It was a headache for me, and it was a mistake.
- P Ok. Do you realize that that record is presently at the Pima County Sheriff's Department as printed right there?
- W This one.
- P That's correct.
- W What do you mean as printed?
- P Booked to serve three days on that particular,
- W Oh, ok because
- P February 13, 1982.
- W Ok, because it was entered into the computer. You can tell by the computer record. But the most they can do is what's known as a PJ14, which is to sign him out on this record. Can I see this other record you

_____ for me please.

P Yes.

W Ok. If you will, let's see.

P I have the sixty days as a separate record.

W Ok. What I

P It's not the same incident we're talking about.

W May I see this record?

P Sure, go ahead, take a look at it.

W Ok, if I had the folder for this one, I could be able to point out some things to you that there would exist on this record, that should be there. For example, that the case number should be the same as far as I know. Ok. The problem was as I explained, he—this was done on a Saturday. I was off on weekends at that point. When I came back on Monday, there were two records. This one and another one. So I took [unintelligible]

W This man shouldn't have been booked twice. Ok. What is, it's, as far as we can know, it was booking a man for the same thing over, which is not what should be done.

P Why would he of reported there in the first place?

W For the Detention Work Program.

P Ok. But, but this record was in your possession. Is that correct?

W Yeah.

P At your residence. And that is an original record, rather it's a mistake or not.

W It, it was a mistake. So I just tossed it in my briefcase.

P An original record mistake?

W Yes. I just tossed it in my briefcase, and it stayed there till (interrupted).

P Do you realize that if that would be a security—a breach of security also to be in your possession at your residence?

W No.

P Does anybody else have access to these papers at your residence.

W That's a possibility.

P Then if somebody else could see these records, that'll be a breach of security, is that correct? That's not entitled to them. Your _____ don't work for the Pima County Sheriff's Department?

W I can't say.

P Or your brother-in-law. They wouldn't have any reason to have access to these records would they? (inaudible)

W No, I don't suppose they don't.

P Ok. (Long Pause) Do you subscribe to magazines that deal with explosives, Jason?

W What do you mean?

P Like is this a hobby of yours also?

W It was an interest.

P Ok. Do you have magazines dealing with this or _____ books.

W Yes.

P How about a hand grenade?

W Under (inaudible).

P Ok. This is a part of your hobby?

W Ah, it was a trinket.

P Ok. Taking all these trinkets as a whole, what would be your observation if you were to find all these in possession of an individual? I mean, what would you think? Weapons, explosives, police radios, ah, hand grenades, book on explosives,

W I'm not sure I understand your question.

P What would be your impression of an individual that ah possessed this type of stuff?

W That he had an interest in them.

P I'll show you a photograph at this time Jason of ah, several photographs in fact that—let me show you a picture of a shirt obtained as a result of the search warrant when they photographed your residence.

TAPE TWO, SIDE ONE, CONTINUING STATEMENT OF JASON H. WILLIAMS, #1713, AS GIVEN TO DETECTIVE GARY L. PETERSON, #237.

LEGEND: P = Peterson, Gary

W = Williams, Jason H.

P I believe I just showed you a picture of a shirt Jason and ask you if you recognize that shirt and you say you don't.

W No.

P Do you own a shirt that looks similar to that or like that?

W Not as far as I know.

P I am showing you another picture of a shirt, would you look at that and see if you recognize it?

W No.

P Do you own a shirt like that?

W Yeah, I may.

P You own one that looks similar to that? If that was found in your residence, do you own a shirt like that?

W I think I own a white shirt with short sleeves, I'm not sure.

P Okay, how about the shirt right there?

W No.

P You don't recognize those shirts?

W No.

P Okay.

W You're dealing with a lot of clothing. My mother wears shirts, my father wears shirts, we have several people living in the house over the past couple of years, my

sister's friends, my friend's staying in the house. Could be anybody's.

P All the clothing is mixed in together or——?

W Basically, wherever it ends up is where it ends up and whoever finds it, you know, if they find it again, it's theirs.

P Okay. Okay, again, in preparation before we end the statement Jason, I'm going to ask you one more time if you are willing to discuss these two incidents involving the vehicles that I have talked to you about where two individuals were stopped, both of them females, by an individual in another vehicle and I am going to ask you again if you will, are willing to answer my questions in regard to these. Understanding that your refusal may result in termination from the Pima County Sheriff's Department?

W Under my attorney's advisement, due to the ongoing criminal investigation, I am going to have to refuse.

P Okay. Do you have anything that you would like to add to this statement at all at this point Jason. That you would like the Sheriff to know or the administration to know or that you think is pertinent to the statement that you have given to me today?

W Okay. I just feel that at this point, these proceedings are on the basis to look for an excuse to terminate me.

P Why do you feel that Jason?

W I, that's the way I feel. That's what I'd like to leave it at.

P Okay, anything else you'd like to add?

W Not really.

P Is this a true and factual statement given of your own free will and volition without threat, duress or promise of reward?

W I can't say that.

P Okay, let me break it down. Are you giving this

statement of your own free will?

W Yes.

P Okay, have you been threatened to give this statement?

W Yes.

P In what manner?

W I have been threatened with losing my job.

P You have been told that if you don't cooperate, is that correct, with the Internal Affairs Section, that you could be terminated.

W Yes.

APPENDIX P

TRANSCRIPT OF AN INTERROGATION BY PIMA COUNTY SHERIFF'S DEPARTMENT INTERNAL AFFAIRS, RECORDED BY JASON H. WILLIAMS, SUBJECT OF THE INTERROGATION, ON SEPTEMBER 8, 1982.

Present during the interrogation at first:
Maurice M. Stern, attorney for Williams
Dep. Gary Peterson, PCSD
Jason H. Williams
Sgt. Paul Peterson

(The conversation had begun before the tape machine was turned on)

G. PETERSON: ...called you down here for, is to answer some questions, OK? with regards to an internal affairs investigation. I've talked to the Sheriff on this, he's aware of it..uh...the Sheriff has indicated to me that Jason should cooperate with internal affairs in this investigation. I believe I told you yesterday when I talked to you that Jason has no right to have an attorney present during this interview. The Sheriff has indicated the same to me. OK?

STERN: I know you told me that yesterday...

G. PETERSON: Right. And that still stands. Uh...the reason that I say Jason is here...uh...is to give us a statement in regards to the investigation that was conducted some time ago started by the criminal investigation division and is now going to be investigated by the internal affairs section which is a separate investigation. You were told yesterday that whatever is said in the internal investigation cannot be used against him in the court proceedings. (Garbled) (two persons talking)...and that's the reason he does not have the right to have an attorney present. (Garbled — two persons talking)...Anyway what we would like to do is sit down and take a statement from Jason. I'd like Jason to answer us himself if he refuses to give us a statement, fine, he can tell

us and then the Sheriff will decide what he wishes to do. I think we discussed the consequences, the Sheriff told you what the consequences were yesterday.

STERN: Yes.

PETERSON: OK. Jason, you are aware of the consequences.

STERN: He can get fired, that's what we talked about.

PETERSON: That's true.

STERN. OK. Now I can tell you that Jason feels that he is entitled to have an attorney because when you say what we discuss here will not be used, we frankly don't believe you. I know you tell us this in good faith...

G. PETERSON: (Garbled — two persons talking)...you know that there's no way, if we tell Jason, Jason (garbled) ...there's no way of ever getting that in court.

STERN: Well...I would like to have a letter from the County Attorney to that effect because you're liable to take this position here and Jason is liable to find himself in court proceedings, you know, in the future, and the County Attorney is liable to take a completely different position. I don't know that, I can't rely on what you're telling me and that's where we are. Because we have evidence from an investigating officer already where the criminal investigation has spilled over, with the questioning into the internal affairs. Questions about, uh, I think it was Susan McCormick down in Sierra Vista...somebody called her...

G. PETERSON: (That was our investigation) that didn't spill over, by the way...that information was obtained through the search warrant that was served on Jason (garbled — two persons talking)...it was part of the jail records...

STERN: It was the questions, that's what I'm getting at. The questions had to do with Jason having some sort of a sexual relationship with females (garbled)...

G. PETERSON: That question was never asked of her...

STERN: Well, something along that line...

G. PETERSON: No...no...I was the one who spoke to her. The word sex didn't come up at all in the conversation.

STERN: OK. I don't want to get in the way of any questions you want to ask here. My job here is to make sure that Jason's constitutional rights are not trod upon. But I want to tell you this before hand, just like I spoke to you on the telephone, I also told this to the Sheriff that I feel that Jason should not be asked any questions concerning the ongoing criminal investigation, you know concerning what you call "traffic stops" and what I call criminal assault.

PETERSON: (Garbled)...criminal assault, traffic stops, whatever you want to call them. The Sheriff believes that those traffic stops are germane to...

STERN: (Garbled — two persons talking) ... I anticipate that this will be an area of, you know, direct clash, so sit back here and keep your mouth shut. You can ask Jason whatever questions you want...

G. PETERSON: We've been directed by the Sheriff that you can't be here.

STERN: We'll just let Jason decide what he wants to do. We haven't reached that point yet, we're just in discussion right now. I'd also like to point out to you that Jason has cooperated fully, you know. There are two of these assault incidents...one in April or May, something like that...one in August, as I understand it...from the search warrant and affidavit. In the first one, Jason sat down and gave a statement to a Detective Richards of the Sheriff's Department, he sat down and told him everything that he knew. As far as he knows, Richards told him (garbled — someone coughed)...and that's that. I know that you link up the second one with the first. So, I guess we're at the point now where you can start asking question...(Garbled — two persons talking)

G. PETERSON: Again, I tell you that the Sheriff indicated...I

indicated that you requested that you be present...he says no. He indicated that you had no right to be present. That's been a policy for some time, uh, he will occasionally allow people to be present, but that is entirely up to the Sheriff. Not up to me.

STERN: Did the Sheriff indicate any reason why he didn't want me to be present here today?

G. PETERSON; He didn't indicate to me, no. It's just that, as I say, it's been a policy for years that I know of, and that's the way the policy has been handled, except with a very few exceptions and he didn't say there would be an exception in this case.

STERN: Are you now asking me to leave the room?

G. PETERSON: (Yes) Yes, sir. We will before we get started.

STERN: OK. Now, when that point come, before we get started, I assume we'll reach that point soon, you have the, uh, as we discussed, you have the right to have an attorney present if you wish to. Now, you can waive that if you want to. Now, I'll wait outside the door, just right outside the door, and that's as far as I'll go, because if they ask me to go outside, that's a horse of a different color. If at any time, you have a question if you'd like to go that route, and you want to discuss a question with me, I will then ask you to ask the deputies if you can discuss that with me out of their hearing. It seems to me that the Sheriff probably will discharge you from your duties if he's instructed the deputies here to see to it that I'm out when your are questioned. There are two parts to this whole thing: one is to protect your constitutional rights (Garble — Peterson trying to interrupt) the other part is, of course, the defense of your job security which may or may not result in civil law suits, etc. or appeals from whatever the Sheriff decides to do. So, as to that aspect of it, I think you should stay here and answer questions within the confines of what we spoke about outside. And those

instructions are to you that you can do what you wish in spite of the suggestions I'm giving you here, is not to answer any questions concerning the ongoing criminal investigation. As to these two what they call stops, and I call assaults...anything else, I think the Sheriff should know, I think the Sheriff should know everything about the jail records that were found in your possession, etc. It's fair game for an internal investigation as to why those jail records were in your possession and you should tell the Sheriff's deputies. If there is any question about any of the other matters that may come up, ask for me to discuss it. But as to any question that may be asked of you which may result in some proceedings for a crime situation, I don't think you should answer them and I don't think your being a member of the Sheriff's Department means that you immediately waive all your constitutional rights. I think it is within your constitutional rights to refuse to answer questions regarding the ongoing criminal investigation. With that, do you want me to go out of here?

G. PETERSON: Let's get that straightened out because we are goin to ask Jason questions about...

STERN: I say assaults...

G. PETERSON: Right. And he will not be allowed to confer with you as to his...he can refuse to answer and if he does...like I say...(Garbled — two persons talking)

STERN: I know what the questions your are going to ask are...

G. PETERSON: I say it will deal with those stops and items found in his possession in his ..during the search warrant...those things I am aware of, I have a list of questions.



OCT 16 1990

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1990

JASON WILLIAMS,

Petitioner,

v.

PIMA COUNTY; THE PIMA COUNTY MERIT
COMMISSION; AND CLARENCE DUPNIK,
Sheriff of Pima County,

Respondents.

Petition For Writ Of Certiorari To The
Supreme Court Of The State Of Arizona

BRIEF OF PIMA COUNTY MERIT COMMISSION
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- A. CAN A PETITION FOR WRIT OF CERTIORARI BE GRANTED WHEN THE JUDGMENT APPEALED FROM IS NOT A FINAL JUDGMENT?
- B. CAN A SHERIFF'S DEPARTMENT INTERNAL AFFAIRS INTERVIEW PRIOR TO THE DISCHARGE OF AN EMPLOYEE, AT WHICH INTERVIEW THE EMPLOYEE IS ADVISED OF THE CONCERNS AND EVIDENCE WHICH MAY LEAD TO DISCHARGE AND IS GIVEN AN OPPORTUNITY TO RESPOND, SATISFY THE PRE-TERMINATION HEARING REQUIREMENTS ENUNCIATED IN *CLEVELAND BOARD OF EDUCATION v. LOUDERMILL*, 470 U.S. 532 (1985)?
- C. SHOULD THE UNITED STATES SUPREME COURT GRANT A PETITION FOR WRIT OF CERTIORARI REGARDING A CONTESTED FIFTH AMENDMENT ISSUE WHERE THERE IS AN INDEPENDENT, SUFFICIENT STATE GROUND FOR THE LOWER COURT'S DECISION?
- D. DOES A PUBLIC EMPLOYER'S STATEMENT THAT AN EMPLOYEE MUST ANSWER QUESTIONS AND THAT THE ANSWERS WILL NOT BE USED IN ANY CRIMINAL PROCEEDINGS CONSTITUTE A SUFFICIENT GRANT OF IMMUNITY THAT THE EMPLOYEE MAY BE DISCHARGED FOR FAILURE TO ANSWER SAID QUESTIONS?

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STATEMENT OF THE CASE

In October, 1979, Jason Williams was hired as a Corrections Officer by the Pima County, Arizona, Sheriff's Department. On September 13, 1982, Williams was discharged from his position. His termination stemmed from an Internal Affairs investigation which had been instituted to determine Williams' involvement in two similar incidents involving young women who had been pulled over late at night by a man posing as a law enforcement officer (the "traffic stops"). Appendix F, A-32.¹

As a result of the investigation into these incidents, Pima County Sheriff's Officers executed a search warrant at Williams' residence on August 13, 1982. During the search, officers found various court and Sheriff's Department records, booking slips, and many weapons. As a result of this search and other evidence concerning Williams and the traffic stops, Williams was placed on administrative leave on August 19, 1982, pending further investigation.

On September 7 and 8, 1982, an Internal Affairs Investigator from the Pima County Sheriff's Department conducted tape-recorded interviews with Williams. Williams and his attorney were told, prior to the commencement of the interview, that the purpose of the interview was to take Williams' statement regarding the traffic

¹ All references to Appendices A-P are to those Appendices attached to Petitioner's Petition For Writ Of Certiorari. Appendix 1 is attached to this Opposition.

stops. Appendix N, A-63 - A-65; Appendix P, A-101. They were further informed that the Sheriff's Department had some questions about department records which had been found in Williams' residence during the search. Appendix N, A-63; Appendix P, A-100. The interviewer informed Williams' attorney that these questions were part of the Internal Affairs investigation and not part of any on-going criminal investigation. Appendix N, A-64. Further, he was informed that his answers would not be used against him in any criminal investigation. He was informed several times that he could be fired if he refused to cooperate fully with the Internal Affairs investigation by answering those questions. Appendices N, A-64 and O, A-98.

Williams was then questioned about his potential involvement in the traffic stops. Appendix O, A-72 - A-88. He was also questioned about the documents discovered at his residence during the search. Appendix O, A-89 - A-95. He was informed that the possession of these documents was a violation of the department's rules; in fact, the interviewer quoted the rule to him. Appendix O, A-91.

Williams subsequently refused to answer any questions concerning the traffic stops, asserting instead his Fifth Amendment privilege against self-incrimination. While the subject matter of the criminal investigation and the Internal Affairs interview was the same, at least as to Williams' involvement in the traffic stops, Williams was assured numerous times that the Internal Affairs interview had no relationship to the criminal investigation, and that his responses to questions during the Internal

Affairs interview would not be part of the criminal proceedings. Appendix N, A-64. Appendix P, A-99.

It is also clear from the transcript of the interview that Williams knew, both from the Internal Affairs investigator and from the Sheriff, himself, that his refusal to answer questions could and would result in his termination. Appendix N, A-64 - A-69. Williams knew then, at the interview, that his refusal at the Internal Affairs investigation to answer questions related to his potential involvement in the traffic stops was unacceptable and, further, that the unauthorized possession of departmental records at his residence was a violation of departmental rules and regulations. He knew that he could be terminated. Williams availed himself only of the opportunity to explain his possession of those documents.

Williams was subsequently served with the Notice of Termination. The Notice was consistent with the information given at the interview: he was being terminated for failing to cooperate with an Internal Affairs investigation, and for mishandling official departmental documents and records, in violation of Pima County Sheriff's Department Manuel Section 7.01 5, 7.02 6 and 7.05 7. Appendix G, A-38.

At Williams' post-termination hearing, the evidence was restricted to two issues: whether Williams was properly terminated for failing to cooperate in an Internal Affairs investigation and whether he was properly terminated for violating departmental rules and regulations with regard to the handling of departmental records. No testimony was introduced by the Pima County Attorneys' Office regarding Williams' alleged involvement in the

traffic stops. The testimony on that issue related solely to the question of whether Williams could properly have refused to answer questions at the interview. Appendix F, A-36.

After the discharge, a full, adversary hearing was conducted before the Pima County Merit Commission, and the hearing officer at the post-termination hearing found that Williams had been properly terminated on both of the above grounds. Williams appealed this decision to the Pima County Superior Court, which reversed the Commission's decision. The Pima County Merit System Commission, Pima County, and Clarence Dupnik, Sheriff of Pima County, appealed to the Arizona Court of Appeals which, on December 14, 1989, reversed the trial court's ruling and ordered Williams' termination affirmed. While the appellate court did rule on the constitutional issues presented by Williams, the decision also reflects that an independent basis, unrelated to Williams' constitutional claim, *i.e.*, the unauthorized possession of departmental records, existed for Williams' termination. Appendix C, A-16.

On September 17, 1990, Judgment was entered in the Superior Court of Pima County, pursuant to the mandate previously issued by the Arizona Court of Appeals. On September 28, 1990, Petitioner herein filed a Motion For New Trial, pursuant to Rule 59 of the Arizona Rules of Civil Procedure. Appendix 1.

SUMMARY OF ARGUMENTS

A. The Petition For Writ Of Certiorari should be denied because the Petitioner has now filed a Motion For New Trial in connection with this matter in the Pima County Superior Court, State of Arizona. By filing the Motion For New Trial, Petitioner has demonstrated that the decision which Petitioner seeks to have reviewed is not final. 28 U.S.C. § 1257 provides for the grant of a writ of certiorari only from a "final" decision, and it is well settled that this Court will not, as a rule, review decisions which are either not final or subject to further modification at the state level.

B. Although the Petitioner's discharge occurred over 2 years before this Court's decision in the case of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), the Petitioner received notice and an opportunity to be heard in connection with his discharge prior to its occurrence. The Internal Affairs interview which preceded his discharge satisfied all due process requirements identified in the subsequent *Loudermill* decision.

C. The decision of the Arizona Court of Appeals, affirming the Merit System Commission's decision on the grounds of Petitioner's unauthorized possession of departmental records, was predicated upon a sufficient, independent ground for Petitioner's discharge; accordingly, this Court should not address Petitioner's Fifth Amendment claim.

D. Even in the absence of a sufficient, independent state ground for his discharge, Petitioner's Fifth Amendment rights were not violated because the Petitioner was

given a sufficient grant of immunity by an agent of the Sheriff's Department. The statement to the Petitioner that his answers would not be used in any criminal proceeding was sufficient to require that he answer the questions posed to him. Furthermore, the questions were sufficiently related to his employment as a corrections officer for the Pima County Sheriff's Department to permit the Sheriff's Department to discharge him for his failure to respond.



ARGUMENTS IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

A. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE JUDGMENT APPEALED FROM IS NOT A FINAL JUDGMENT.

It is well settled that this Court will not, as a rule, review judgments of lower tribunals until a final judgment is entered. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945). This "final judgment" rule helps prevent interference with state proceedings when the underlying dispute may ultimately be resolved at the state level. *Costarelli v. Massachusetts*, 421 U.S. 193, 95 S.Ct. 1534, 44 L.Ed.2d 76 (1975). It could be interpreted to preclude review by the Supreme Court "where anything further remains to be determined by a state court. . . ." *Radio Station WOW, Inc., supra*, 326 U.S. at 124, 65 S.Ct. at 1478, 89 L.Ed. 2092. See also 28 U.S.C. § 1257.

However, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), this Court articulated four exceptions to the finality doctrine. The Supreme Court, in its discretion, may review non-final judgments if (1) the federal question present is conclusive or the result of the pending state court proceedings are preordained; (2) where the federal issue will survive and require review regardless of the outcome of future state court proceedings; (3) where the federal question is finally decided but later review of the federal question cannot be had regardless of the outcome of the state proceedings, and (4) where the federal issue was finally decided with state court proceedings still pending where the Petitioner could be successful on the merits on non-

federal grounds and where reversal of the state court on the federal issue would preclude any further litigation on the relevant cause of action rather than merely controlling the nature and character of further proceedings. *Cox Broadcasting v. Cohn, supra*.

Petitioner filed his Petition For Writ of Certiorari with this Court on September 17, 1990. On or about September 28, 1990, Petitioner filed a Motion for a New Trial in the Superior Court of Arizona, Pima County. In his Motion, Petitioner raises additional non-federal issues not raised by Petitioner in the Court of Appeals. Appendix 1. As a result of this motion, state court proceedings are still pending and the judgment which Petitioner seeks to have reviewed in this Court is not "final" as contemplated by the finality doctrine set out by this Court. Further, Respondent submits that none of the *Cox Broadcasting* exceptions to the finality doctrine apply here. The federal issues raised by Petitioner are certainly not conclusive of the litigation, nor is the result of the pending proceedings preordained. Petitioner could prevail on his newly raised non-federal issues and be reinstated, thereby obviating any need for this Court to review the federal questions presented in the Petition. Further, should Petitioner be unsuccessful, federal review of the federal issues raised by Petitioner is still available and not precluded by the outcome. Finally, no federal policy is at risk should the Court deny review, and review at this point would not dispose of or control the outcome of any further state court proceedings.

Respondent submits that review of the Arizona Court of Appeals' decision of December 14, 1989, by this Court

would be premature, and that the Petition should be denied on that ground.

B. PETITIONER WAS AFFORDED A PRE-TERMINATION HEARING CONSISTENT WITH THIS COURT'S DECISION IN *CLEVELAND BOARD OF EDUCATION v. LOUDERMILL*.

Petitioner claims that the Arizona Court of Appeals' decision on the pre-termination hearing issue is unconstitutional and inconsistent with this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). However, the adoption of the Petitioner's position would require a reinterpretation of *Loudermill* to require a much more formalized pre-termination proceeding. Even if the Court were inclined to reconsider the flexible pre-termination procedures mandated in that case, the facts of Mr. Williams' case do not merit review, let alone modification of the *Loudermill* decision.

At the outset, it should be noted that this case arose in 1982, over two years before this Court's decision in *Loudermill*.² Thus, it should come as no surprise that the

² At the time of Williams' discharge, Arizona law was clear to the effect that a pre-termination hearing was not required when there were adequate post-termination procedures. *City of Flagstaff v. Superior Court*, 116 Ariz. 382, 569 P.2d 812 (1977); *Montes v. Lininger*, 119 Ariz. 174, 580 P.2d 6 (App. 1978); *Roberts v. City of Tucson*, 122 Ariz. 91, 593 P.2d 645 (1979); *Bower v. Arizona State School for the Deaf and the Blind*, 146 Ariz. 168, 704 P.2d 809 (App. 1984). (Interestingly, the Arizona Supreme Court denied review of the *Bower* case on the same day that *Loudermill* was decided, March 19, 1985.)

names applied to various parts of the process were not the same as those used in the *Loudermill* decision. Nevertheless, whether it was designated as a "pre-termination hearing" or as an "Internal Affairs Interview," Jason Williams received "some kind of hearing", as contemplated in *Loudermill*; he was clearly provided with notice and an opportunity to be heard; he had the opportunity to prevent a mistaken decision. Indeed, he was virtually begged to provide answers to questions.

Furthermore, the Petitioner's characterization of the reasons for his discharge must be carefully scrutinized. Contrary to the implications set forth in the Petition, Williams was not discharged because he was suspected in connection with the traffic stops. He was discharged because he possessed Sheriff's Department records in his house, in violation of Departmental rules and regulations, and because he refused to answer questions in an interview concerning those records and the traffic stops.

Williams was afforded a pre-termination procedure which satisfies the requirements of *Loudermill* and the cases leading to it. The cornerstone of the due process procedures set out in *Loudermill* is flexibility. The amount and nature of due process required at the pre-termination stage should be determined by the facts of the case, including the availability of full post-termination administrative and judicial review. *Loudermill*, 470 U.S. 532, 540 (1985).

The Arizona Court of Appeals correctly applied this flexible due process analysis to the facts of this case, including the fact that Williams had access to and availed himself of a full range of post-termination procedures.

The transcripts and records available to this Court in Petitioner's Petition as Appendices G, N, O, and P demonstrate that Williams was aware of the subject matter of his employer's concerns: his alleged involvement, while posing as a law enforcement officer, in unlawful stops of young women at night, as well as his possession of departmental records and documents at his home in violation of department rules and regulations. He was also apprised of the evidence against him, particularly the documents discovered in his home, and he was given every opportunity to present an explanation of these concerns. He refused to present any explanation regarding his potential involvement in the traffic stops, but offered some explanation of his possession of departmental documents. Williams was aware that his refusal to cooperate with the interviewer could result in his termination. Appendix N, A-64.

Petitioner would interpret *Loudermill* to require *written* notice of the potential termination, the grounds therefor and an opportunity to respond *in writing*. Not only is this explicitly not the holding of the case, *Loudermill*, 470 U.S. 532, 540, 105 S.Ct. 1487, 1495 ("The tenured public employee is entitled to oral or written notice. . . ."), it would serve no purpose to require written notice and an opportunity to respond in writing in this case. Petitioner based his refusal to explain his activities on Fifth Amendment grounds. Had his employer given him written notice and an opportunity to respond in writing, Petitioner would still have raised the Fifth Amendment as a reason not to respond and he would have been terminated for failing to cooperate with an Internal Affairs

investigation, as well as for violating the department's rules regarding the documents.

This Respondent submits that the interview in this case, coupled with the extensive post-termination procedures available, satisfied the due process requirements of *Loudermill* and served as that initial check against mistake which *Loudermill* was intended to provide. *Loudermill*, 470 U.S. 532, 540, 105 S.Ct. 1487, 1495. The Arizona Court of Appeals' decision is entirely consistent with the concepts enunciated in *Loudermill* and does not require Supreme Court review.

C. THIS COURT NEED NOT ADDRESS PETITIONER'S FIFTH AMENDMENT CLAIM SINCE THE ARIZONA COURT OF APPEALS UPHELD PETITIONER'S TERMINATION ON THE GROUNDS THAT PETITIONER VIOLATED PIMA COUNTY SHERIFF'S DEPARTMENT RULES BY MISHANDLING DEPARTMENTAL RECORDS, AND THIS DETERMINATION WAS AN INDEPENDENT, SUFFICIENT GROUND FOR PETITIONER'S TERMINATION.

It is well settled that the Supreme Court will not reach a constitutional question if the state court judgment rests on more than one ground, one of which is non-federal in nature and adequate to support the judgment. *Fox Film Corp. v. Miller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935). This rule was explained in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 567-568, 97 S.Ct. 2849, 2852-2853, 53 L.Ed.2d 965 (1977):

"We are not permitted to render an advisory opinion, and if the same judgment would have

been rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." (Citing *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 463 (1945)).

In this case, the judgment appealed from rests not only on the propriety of Petitioner's discharge for failing to answer his employer's questions after receiving a proper and adequate grant of immunity, but also on the propriety of his discharge for mishandling official departmental records and documents in violation of Pima County Sheriff's Department rules and regulations. While the first ground implicates a federal question, the second ground, the records violation, is clearly a matter of local law.

The Arizona Court of Appeals determined that Petitioner's termination for records violations was based on the hearing officer's conclusion and findings, which were supported by the evidence and not arbitrary. Appendix C, A-10. In his specially concurring opinion, Judge Livermore specifically stated that Petitioner's possession of jail records "provid[ed] an independent basis for discharge." Appendix C, A-16. Thus, even if this Court were to determine that the Arizona Court's view of federal law was incorrect, the Court of Appeals would still have upheld Petitioner's termination on the grounds that he violated Sheriff's Department Rules and Regulations regarding the handling of official documents and records.

Because Petitioner's dismissal for mishandling departmental records is an independent and adequate, non-federal ground for Petitioner's termination, the Petition should be denied.

D. PETITIONER WAS NOT UNLAWFULLY REQUIRED TO GIVE UP HIS CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION, BECAUSE HE HAD BEEN GRANTED IMMUNITY; THUS, PETITIONER'S DISCHARGE FOR REFUSING TO ANSWER QUESTIONS ASKED BY HIS EMPLOYER WAS NOT IMPROPER.

Petitioner argues that the Arizona Court incorrectly decided that he was properly terminated for failing to answer his employer's questions. He contends that he properly invoked his Fifth Amendment rights and that the employer's offer of immunity was invalid because it did not comport with this Court's decisions in *Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968) and *Lefkowitz v. Cunningham*, 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977).

Those cases stand for the proposition that a public employee can be discharged for refusing to answer his employer's questions if such questions relate narrowly, directly and specifically to the performance of his duties and if he is not required to waive immunity with regard to the use of his answers or the fruits of those answers at any related criminal prosecution. These cases do not expressly require that the employee be specifically informed that the fruits of his statements cannot be used against him.

It is well settled constitutional law that, just as a compelled statement may not be used against a defendant, neither may the fruits of that illegal statement. See e.g., *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9

L.Ed.2d 441 (1963); *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). The record clearly establishes that Petitioner was specifically told on more than one occasion that his answers to the interviewer's questions would not be used in any subsequent or parallel criminal proceeding. Appendix N, A-66; Appendix P, A-99 - A-100. Thus, Petitioner was not required to waive his Fifth Amendment immunity, as prohibited by *Gardner*, *supra* and its progeny. Because the fruits of a compelled statement are as inadmissible as the statement itself, *Wong Sun*, *supra*, it is not a constitutional defect that Petitioner was not specifically informed that the fruits of any statement, as well as the statement itself, would be inadmissible.³

Petitioner also argues that the questions asked did not relate specifically, directly and narrowly to the performance of his duties, which he claims is also a constitutional defect. While it is true that *Gardner* and its progeny speak in terms of questions that relate specifically, directly and narrowly to the employee's job performance, those cases do not define job performance. However, there is state law in Arizona defining job performance in the context of the questioning of a public employee prior to termination.

In *City of Tucson v. Mills*, 114 Ariz. 107, 559 P.2d 663 (App. 1971), the Arizona Court of Appeals specifically

³ Indeed, Williams' concerns at the interview, as stated by his attorney, did not relate to the fruits of his answers, but to the authority of the Sheriff's Department employee who explained the immunity to them. Appendix N, A-67, and Appendix P, A-100.

held that the off-duty assaultive conduct of a city park guard was legitimately subject to employer inquiry because his private conduct violated the public trust, the upholding of which was part of the park guard's official duties. Williams' off-duty conduct also involved a potential violation of the public trust, because he was suspected of stopping young women late at night while impersonating a Sheriff's officer. This activity clearly falls within the parameters of *Mills* and was legitimately subject to employer inquiry under state law.

The Arizona court properly applied state law in determining whether Petitioner's conduct implicated his official duties and then properly applied the federal standards as to immunity. There was no constitutional violation.

CONCLUSION

The Petition For Writ of Certiorari should be denied because state court proceedings are still pending which could obviate the need for Supreme Court review of this case. Further, the Arizona Court of Appeals correctly applied the pre-termination requirements articulated in *Loudermill* and determined that a pre-termination interview at which Petitioner was informed of his employer's concerns, the rules he was suspected of violating and the evidence in support of those concerns and suspicions, and he was given an opportunity to respond, coupled with full post-termination administrative and judicial review, met and satisfied all applicable federal standards.

Finally, this Court need not address Petitioner's Fifth Amendment claim because his termination is based on grounds not implicating a federal question or right, and Petitioner was properly terminated for records violations alone, an independent state law ground. Further, there was no Fifth Amendment violation because the immunity granted to Petitioner was sufficient to protect his Fifth Amendment rights.

The Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Kenneth K. Graham, Esq.
P.C.C. No. 21588

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

JASON WILLIAMS,)	No. C-206997
)	
Plaintiff,)	RULE 59
)	MOTION FOR
vs.)	NEW TRIAL
)	
PIMA COUNTY, et al., et ux.)	(Assigned to the
)	Hon. Michael
Defendants.)	J. Brown)
_____)	

Jason William, by and through his undersigned attorney, hereby files his Motion for a New Trial pursuant to Rule 59(a)(1)(2)(3) and (4), of the Arizona Rules of Civil Procedure. This Motion is supported by the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 28th day of September, 1990.

RISNER & GRAHAM

By /s/ Kenneth K. Graham
Kenneth K. Graham, Esq.

A copy delivered this 28th day of September, 1990, to:

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MEMORANDUM OF POINTS AND AUTHORITIES
FACTS

As this Court is aware, this case was recently remanded to this Court subsequent to an appeal by the Defendants. After the remand to this Court, the Court on August 28, 1990 signed the Judgment submitted by the Defendants. The Judgment was entered by the Clerk on September 17, 1989. Since an adverse Judgment has now been entered against the Plaintiff, Plaintiff is now requesting this Court to grant a New Trial pursuant to Rule 59(a)(1-4) of the Arizona Rules of Civil Procedure. This Motion for New Trial addresses issues which were not and could not have been considered by the Court of Appeals since the issues raised here were not addressed by this Court at the time of a Judgment and were not alternative basis which supported the prior Judgment of this Court which was overturned on appeal.

The issues raised in this Motion for New Trial are as follows:

- (1) Did this Court err in denying Plaintiff's Motion to Compel dated January 20, 1984;
- (2) Did this Court err in denying Plaintiff's Motion for a Trial De Novo filed on May 7, 1986; and
- (3) Should a New Trial be granted pursuant to Rule 59(a)(4) as a result of newly discovered material

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evidence which establishes that the Merit Commission's decision terminating Jason Williams for refusing to answer questions was arbitrary and capricious.

FACTS

In Plaintiff's Complaint dated January 25, 1983, the Plaintiff made a demand that the entire record of the Commission proceedings be made a part of this proceeding. The Plaintiff specifically requested that the transcript, if any, of the Agency Proceedings be produced. See Complaint Count Two Paragraph X. A certified copy of the Record of the Administrative Hearing was not filed by the Defendants. On January 20, 1984, Plaintiff filed a Motion to Compel the filing of the Record of the Administrative Hearing pursuant to A.R.S. §12-909. Although this Motion was initially granted on February 21, 1984, a rehearing was granted as a result of the Defendant's claim that they had not received a copy of the Motion.

On July 31, 1984, prior to the rehearing, the Pima County Merit System Commission filed the certified copy of the proceedings below with the exception of the transcript of the hearing which was held before the Pima County Merit Commission. In their Response to the Plaintiff's Motion to Compel the Defendants all agreed that a certified copy of the record before the Administrative Record should be filed. However, the Defendants maintained that they should not be required to produce a transcript of the proceedings at the hearing. In this regard, the Defendants relied on Rule 13.4(B)(7)(a) of the

Pima County Merit System Commission Rules. On August 21, 1984, the Motion to Compel was denied.

On May 7, 1986, Plaintiff's counsel filed a Motion for Trial De Novo based upon Plaintiff's understanding that the transcript of the Administrative Proceedings below had been destroyed. See A.R.S. §12-910(B). The Defendants again responded contending that it was the Plaintiff's obligation pursuant to Pima County Ordinance No. 1975-36, Section 19B(1) and Pima County Merit Commission Rule 13.4(B)(7), to obtain the transcript of the proceedings.

In support of their Opposition to the Motion for Trial De Novo, the Merit Commission filed the Affidavit of Heather Armstrong who was the Court Reporter at the October 21, 1982 hearing before the Pima County Merit Commission. In that Affidavit at paragraph 10, Ms. Armstrong stated that when a request for a transcript was made by Michael Brady in the first half of 1985, Mr. Brady was advised that a complete transcript could not be produced since the stenotype papers and a substantial portion of the cassette tape recordings were no longer available. Paragraph 14 of that Affidavit reveals that part of the cross-examination of Jason Williams, part of the re-direct examination of Jason Williams, part of Gary Peterson's testimony and most of the testimony of David Heupel could not be reproduced.

Recently, new evidence has come forth establishing that the Merit Commission acted arbitrarily in terminating Mr. Williams for refusing to answer questions. This new evidence takes the form of the determination made by the Pima County Law Enforcement Officers Merit

System not to uphold the termination of Deputy Penner, who was terminated by Sheriff Dupnik based upon his refusal to cooperate with an internal affairs investigation. Although a different Merit System Commission was involved, it is undersigned counsel's belief that the members of the Pima County Law Enforcement Officers Merit System are the same as the members of the Pima County Merit System Commission. If anything, the circumstances for the termination of Mr. Penner were stronger as it was clear that the subject matter of the internal affairs investigation involving Deputy Penner was conduct that occurred unquestionably during the course and scope of his employment. Plaintiff will attempt to obtain a copy of the Hearing Officer's Report re: Penner to provide to this Court.

LAW AND DISCUSSION

A.R.S. §11-356 provides, in pertinent part, as follows:

"(A) Any officer or employee in the classified Civil Service may be dismissed, suspended or reduced in rank or compensation by the appointing authority after appointment or promotion is complete only by written order, stating specifically the reasons for the action. The order shall be filed with the Clerk of the Board of Supervisors and a copy thereof shall be furnished to the person to be dismissed, suspended or reduced.

(B) The officer or employee may within ten days after presentation to him of the order, appeal from the order to the Clerk of the Commission. Upon the filing of the appeal, the Clerk shall forthwith transmit the order and appeal to the Commission for hearing.

(C) Within twenty days from the filing of the appeal, the Commission shall commence the hearing and either affirm, modify or revoke the order. The appellant may appear personally, produce evidence, have counsel and, if requested by the appellant, a public hearing.

(D) The findings and decisions of the Commission shall be final, and shall be subject to administrative reviews provided in Title 12, Chapter 7, Article 6. [A.R.S. §12-901 et. seq.]”

A.R.S. §12-909 provides, in pertinent part, as follows:

A. The Complaint shall contain a statement of the findings and decisions or part thereof sought to be reviewed, and shall clearly specify the grounds upon which review is sought. It shall also state what portion of the record and transcript, if any, *shall be filed by the agency* as part of the record on review.

B. Except as otherwise provided, the administrative agency *shall* file an answer which shall contain the original or a certified copy of the portion of the record designated in the Complaint. The answer of the agency may also contain other portions of the record as the agency deems material. By order of the Court or by stipulation of all parties to the action, the record may be shortened or supplemented. (emphasis added).

In the case at bar, the Commission delegated to a Hearing Officer the responsibility to hold a hearing and make a recommendation regarding Mr. Williams’ appeal. In *Schmitz v. Arizona State Board of Dental Examiners*, 141 Ariz. 37, 684 P.2d 918 (App. 1984), the Court considered the appeal of an orthodontist who was censured by the Board of Dental Examiners. In that case, the Board of Dental Examiners referred a complaint to an investigative

committee which conducted a hearing and issued a report containing findings of fact, conclusions of law and recommendations to the Board. The Board reviewed the Committee Report and issued its order censuring Schmitz and directing restitution and probation. 141 Ariz. at page 40. Schmitz appealed the ruling of the Board to the Superior Court. The Board filed a certified record pursuant to A.R.S. §12-909(B). Schmitz requested a trial de novo on the grounds that although a transcript had been made it was so inaccurate that the trial court could not properly review the record. The Superior Court denied the motion and upheld the action of the Board.

On appeal to the Court of Appeals, the Court noted that the transcript which had been provided pursuant to A.R.S. §12-909(B) consisted of 21 pages which contained 32 designations of "inaudible" for comments or testimony of an indeterminate length.

The Court of Appeals held as follows:

"When considering whether there is substantial evidence to support the agency's decision, the Superior Court must review the "entire record". A.R.S. §12-910(A). See *Arizona State Board of Medical Examiners v. Clark*, 97 Ariz. 205, 398 P.2d 908 (1965). The "entire record" is defined as all evidence received and considered, including the transcript. A.R.S. §41-1009(E)(2) and (F)" 141 Ariz. at page 40.

The Court of Appeals further held that "[T]he Board ignores the fact that upon request by any party, it was responsible for preparing an adequate transcript of the investigative committee meeting. See A.R.S. §41-1009(F) and 12-909(B)." 141 Ariz. at page 41. The Court ultimately

concluded that since the record was inadequate, the judgment of the trial court affirming the Board's determination should be reversed and the matter was remanded to the Superior Court for a trial de novo pursuant to A.R.S. §12-910(B).

In *United Farm Workers of America, AFL/CIO, v. Agricultural Employment Relations Board*, 149 Ariz. 70, 716 P.2d 439 (1986), the Court of Appeals considered the issue of whether administrative transcripts should be made part of the record in an appeal pursuant to A.R.S. §12-901 et. seq. The Court noted that A.R.S. §12-909(A) was phrased in mandatory language. The Court held that before the trial court could review appellant's claim, it was required to order the Agricultural Employment Relations Board to supplement the record with the transcripts. 149 Ariz. at page 75.

The Defendant's reliance upon Pima County Merit Commission Rules is misplaced. The Arizona Legislature provided, pursuant to A.R.S. §11-356 that the findings and decisions of the various County Merit Commissions should be subject to administrative review by the Superior Court pursuant to A.R.S. §12-901 et. seq. A.R.S. §12-909(B) provides in mandatory language that the administrative agency shall file the original or a certified copy of the portion of the record designated by the Plaintiff in the Complaint. A.R.S. §12-909(A) defines the record on review as including the transcript if requested. Mr. Williams requested the transcript and it was not provided. Quite simply, neither the County Board of Supervisors, by ordinances, nor the Pima County Merit System

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Commission has the authority to overrule the Legislature's mandate that the administrative agency be responsible for providing the Superior Court with the administrative record including transcripts if requested.

Moreover, a review of the Pima County Ordinance and the Pima County Merit System Rules relied upon by the Defendants reveal that those rules can be read consistent with the Legislative Enactments.

Pima County Ordinance 1975-36 §19(B) provides as follows:

"The Commission shall prepare an official record of the hearing, including all testimony recorded manually or by mechanical device, and exhibits, but it shall not be required to transcribe such records unless requested by the employee who shall be furnished with a complete transcript upon payment of the actual cost."

This Ordinance defines the official record of the Commission as including testimony which was recorded manually or by mechanical device. The Ordinance requires the Commission to transcribe the recorded testimony upon the request of an employee. Only after the transcript has been completed is the employee, under the Ordinance, required to make payment of the actual cost in order to be furnished with a complete transcript. Therefore, it is the responsibility of the Commission to obtain a transcript of the testimony upon the request of the employee. Since the employee is required to make payment of the "actual cost", and since the "actual cost" can only be determined after the transcript has been provided, and since the payment for the transcript is

made to the Commission, it is clear that it is not the employees responsibility, under the Ordinance, to order the transcript from the Court Reporter. At most the Ordinance provides that in order to be furnished with a complete transcript the employee must make payment of the actual cost.

Rule 13.4(B)(7) of the Pima County Merit System Commission Rules provides as follows:

"All testimony at the hearing shall be recorded manually or by mechanical or electronic device. The Commission shall pay all charges incurred in connection with the presence of a Court Reporter or the utilization of mechanical or electronic devices, excluding, however, the cost of preparation of all or any part of the transcript. The cost of a copy or copies of any such transcript shall be paid by the party or parties ordering the same."

Clearly, this rule does not require the employee to pay the cost of a copy or copies of any transcript. Rather, the cost of a copy or copies of the transcript are to be paid by the party or parties ordering the same. Pursuant to A.R.S. §12-909(A) the transcript "shall be filed by the agency" as part of the record on review. Therefore, if the purpose for obtaining a transcription is for an administrative review pursuant to A.R.S. §12-901 et. seq., A.R.S. §12-909 requires the Commission to order and file portions of the transcript which are designated by the employee and the Complaint filed in the Administrative Appeal. If the employee wanted a portion of the testimony transcribed for some purpose other than the Administrative Appeal, Rule 13 of the Pima County Merit System Commission Rules would be valid authority for

the proposition that the employee would be required to pay for that transcript. However, that is not the factual scenario before this Court.

Plaintiff respectfully submits that this Court erred in denying Plaintiff's Motion To Compel. The transcript should have been prepared by the Merit Commission, and filed with the Answer to Plaintiff's Complaint.

It is now clear that the "entire record" is not available for this Court to review as required by *Schmitz v. Arizona State Board of Dental Examiners, supra*. Since the entire record is not available, a trial de novo should be granted. *Id.*

Finally, the fact that another employee's termination was not upheld where that termination was based upon the same reason Plaintiff was terminated, establishes that Jason Williams' termination was arbitrary and capricious.

Plaintiff respectfully requests this Court to grant Plaintiff a new trial for the above stated reasons.

RESPECTFULLY SUBMITTED this 28th day of September, 1990.

RISNER & GRAHAM

By /s/ Kenneth K. Graham
Kenneth K. Graham, Esq.

In The
Supreme Court of the United States
October Term, 1990

JASON WILLIAMS,

Petitioner,

v.

PIMA COUNTY, THE PIMA COUNTY
MERIT COMMISSION AND CLARENCE W. DUPNIK,
Sheriff of Pima County,

Respondents.

On Petition For A Writ Of Certiorari To The
Supreme Court Of The State Of Arizona

BRIEF IN OPPOSITION OF RESPONDENTS
PIMA COUNTY AND CLARENCE W. DUPNIK,
SHERIFF OF PIMA COUNTY

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STATUTES

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THE WRIT SHOULD NOT ISSUE

I. Petitioner's factual claims are not shown by the record.

Petitioner was dismissed from his employment with Pima County as a Corrections Officer in September, 1982. Petitioner was a permanent employee at the time.

Under the system then (and now) in effect, Petitioner appealed his dismissal to the Merit System Commission, a statutory body created for that purpose. That body was the trier of fact issues in deciding upon the propriety of the dismissal. Arizona Revised Statutes, § 11-356. The court, in reviewing a decision of the Merit Commission, must affirm the decision of the commission if there is any substantial evidence to support it in the record. *DeGroot v. Arizona Racing Comm.*, 141 Ariz. 331, 686 P.2d 130 (App. 1984). The trial court in conducting judicial review may not reweigh the evidence to resolve what appear to be conflicts. *Schade v. Arizona State Retirement System*, 109 Ariz. 397, 510 P.2d 42 (1973). Review by the courts is limited to questions properly raised in the administrative hearing. *Madsen v. Fendler*, 128 Ariz. 462, 626 P.2d 1094 (1981). Petitioner's dismissal was upheld by the commission.

There is no evidence to demonstrate that Petitioner developed his claim – Lack of Pre-termination Due Process – before the Merit Commission. The existing record does show that Petitioner " . . . was aware of the charges for his termination; that he understood them, but did not agree with them." (See Appendix F from Petition, Report of Merit Commission Hearing Officer at p. A-32 of the Petition).

Petitioner has made all variety of other factual assertions about things which he claims did not occur:

a. He was not informed of the rules he was accused of violating. (Petition, p. 4)

b. he was not informed of the evidence supporting his termination. (*Id.*)

c. He was not informed of the pendency or contemplation of a dismissal from employment. (*Id.*)

d. He was not given the opportunity to prepare a response and submit evidence on his own behalf. (*Id.*)

e. He was not given the opportunity to explain why a penalty less than termination should be imposed. (*Id.*)

f. He was not "... informed of the specific reasons for which he was being terminated, given an opportunity to review the evidence against him, compare it to the charges against him or state why the evidence was wrong, why the violations did not occur or if they did occur, why he should not be terminated." (Petition, p. 4)

g. He was notified for the first time of the rules he was being fired for after his termination. (Petition, pp. 4-5)

h. He was never given notice of the specific charges, the employer's evidence or that he had a chance to tell his side of the story. (Petition, p. 10)

i. He was not informed of evidence, no opportunity to be heard, not informed of rules violated, not given notice or opportunity to respond to charges or punishment. (Petition, p. 14)

j. He was questioned without disclosing the evidence on which allegations are based, without notice that he could be fired, without telling him what he did that was wrong. (Petition, p. 16)

These claims provide a dramatic quality to the petition, and might, but for a complete lack of evidence, incline the Court to grant the Writ.

Petitioner suggests that if the record is silent, then he is justified in claiming that the silent record is evidence of the facts enumerated above. (Petition, pp. 10-11) Under normal circumstances the lack of logic in this position is fairly obvious. Where the record is known to be vastly incomplete, the same contention borders on exaggeration. In fact the hearing officer's report shows positively that Petitioner understood the charges.

When the testimony and other evidence was being adduced at the Merit commission hearing, a court reporter was making a verbatim record of the proceedings. As a back-up, tape recordings were also made of the testimony. Both of these methods are in accordance with the rules of the Commission.

Transcripts of the testimony were never prepared because the reporter's notes and tapes were damaged in October, 1984. As a result, the matter proceeded to judicial review, normally a statutory review on the record, on the summary of the testimony made by the hearing officer, together with transcripts of some conversations in the internal affairs division and other documentary evidence. A request by Petitioner for *trial de novo*, based on unavailability of a complete record, was denied. The Court, however, left Petitioner the opportunity to present

testimony if necessary (Appendix A). No such testimony was ever sought or presented by Petitioner.

Petitioner has quoted at length from his Notice of Appeal, the document which activated his employment appeal rights. (Petition, pp. 5-6) While it is true that he claimed lack of due process, there is nothing to indicate that he ever produced evidence in support of this claim. The only reference to the subject is in the hearing officer's report (see p. A-32 of the Petition) where Petitioner himself testified that he was aware of and understood the grounds for his termination.

In summary, while the record which remains does show that certain things *did* occur, lack of evidence, in a record known to be incomplete, cannot be asserted to claim that certain things *never* happened. The existing record, indeed, shows no effort on petitioner's part to produce evidence of a failure of pre-termination due process.

II. The portions of the record which do exist were held by the Arizona Court of Appeals to satisfy procedural due process in light of *Loudermill* (*Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)). Petitioner has contended that the result of that court is inconsistent with the *Loudermill* decision.

Petitioner was dismissed for improper handling of prisoner records at the jail and for disobedience to an order to answer questions about job-relevant off-duty conduct. The decision of the Arizona Court of Appeals found that Petitioner knew about the jail records at his house and was given an opportunity to provide an explanation for these records being at his house. The same

court found that Petitioner was clearly told that he could be fired for refusing to answer questions about the off-duty allegations of impersonating a law enforcement officer. If Petitioner was suffering from a shortage of information on this occasion, the record fails to disclose it. Petitioner did assert in his administrative appeal such a claim, but only in broad general conclusory terms. No evidence supports this claim, and existing evidence shows that he knew of, understood and disagreed with the accusations. The *Loudermill* decision, where Plaintiff received a plenary post termination hearing, as he did here, requires nothing more than an " . . . initial check against mistaken decisions. . . . " 470 U.S. 532 at 546.

III. Petitioner's second issue addresses the scope of permissible questioning under the doctrine of *Garrity v. New Jersey*, 385 U.S. 493 (1967). He contends that he may not be ordered to answer questions by his public employer about off-duty misconduct, even where that off-duty misconduct is of admitted legitimate concern to the public employer. Cited for this idea are *Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Assoc. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 820 (1968); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); and *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). All of these cases have used the well known language of *Gardner v. Broderick*:

"If Appellant, a policeman, had refused to answer questions specifically, directly and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of

himself . . . the privilege against self-incrimination would not have been a bar to his dismissal." 392 U.S. at 278.

The operative part of this quotation in the context of this case is " . . . specifically, directly and narrowly relating to the performance of his official duties. . . . "

The four cases cited by Petitioner, although they include this language, have nothing whatsoever to do with the scope of such questioning. In *Gardner*, a police officer was being questioned about accepting bribes; in *Uniformed Sanitation Men*, employees were being questioned about stealing money from the City of New York, their employer; in *Lefkowitz v. Turley*, architects with contracts with the State of New York were being questioned about procurement fraud and bribery; in *Lefkowitz v. Cunningham*, an officer in a political party was being questioned about suspected political misdeeds. Each case held that sanctions could not follow refusal to answer questions unless the person compelled to answer was provided the functional equivalent of use immunity. In each case that immunity was missing.

More importantly the cases do nothing at all to define the scope of proper questioning. None of these cases involved scope of questioning as an issue presented to be ruled on. Each case did suggest that the questioning that was under consideration was appropriate in constitutional scope, but no such issue was actually decided by the court.

Petitioner has not undertaken to cite a single case which has ruled on questioning about off-duty but job-

relevant conduct. In fact the courts have permitted questions which touch upon off-duty conduct and other rather personal matters as relating to job performance where law enforcement employees are concerned. See *Broderick v. Police Commissioners of Boston*, 330 N.E. 2d 199 (Mass. 1975), cert. denied, 423 U.S. 1048; *O'Brien v. DiGrazia*, 544 F.2d 543 (1st Cir. 1976), cert. denied, 431 U.S. 194; *Gulden v. McCorkle*, 680 F.2d 1070 (5th Cir. 1982).

The result sought by Petitioner would be of little value to public employees' rights to be free from self-incrimination. The establishment of use immunity provides all the protection that exists under the Constitution. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964). Petitioner has admitted that the suspected off-duty criminal conduct of impersonating a law enforcement officer and stopping and assaulting women motorists at night, is a matter of legitimate job-related concern to his public safety employer, the Sheriff of Pima County. Petitioner nevertheless contends that his employer may not demand an accounting for this suspected misconduct from an employee because it occurred off-duty instead of at work. Petitioner maintains this position despite the fact that the use immunity missing in *Gardner, Lefkowitz, et al.*, is uncontrovertably present here.

To permit Petitioner's position to prevail would provide a constitutionally purposeless impediment to information which is acknowledged by Petitioner to be of proper concern to any employer in the corrections or law enforcement field.

CONCLUSION

The petition should be denied. Petitioner has asserted facts in support of his due process claim which are not supported by the record and in some instances contradicted by it. The petition makes legal claims, which are equally unsupported, that the action of the Arizona Court of Appeals is in conflict with decisions of this court and "almost every" federal court of appeals and state courts to have ruled on this issue. This rhetoric ignores both the letter and spirit of the *Loudermill* decision in a setting where a full blown post termination hearing is assured.

The second issue articulated by Petitioner fares no better. He actually suggests that a public employer cannot compel an accounting from his law enforcement employee respecting off-duty conduct of admitted legitimate concern to the employer, even when the use immunity of *Garrity v. New Jersey* is clearly established. In support of this, Petitioner cites four decisions which did not address this issue. If particular off-duty conduct impacts a legitimate area of employer concern, then it is related to the performance of duties. If the sheriff could fire Petitioner for it, why shouldn't he be able to insist on answers to questions about it.

The position sought by Petitioner is strained, creating an artificial, senseless barrier to relevant information.

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CIVIL DIVISION
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App. 1

APPENDIX A

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: MICHAEL J. BROWN CASE NO. 206977

Court Reporter: None DATE June 9, 1986

JASON WILLIAMS (P) Kenneth K. Graham

-VS-

THE COUNTY OF PIMA, et al. (D) Michael P. Callahan

Barry Corey

* * *

MINUTE ENTRY

HEARING RE PLAINTIFF'S MOTION TO CONTINUE
AND MOTION FOR TRIAL DE NOVO AND DEFEN-
DANTS' MOTION TO DISMISS:

Parties not present;

Counsel argue to the Court.

IT IS ORDERED the motion to dismiss is DENIED.

IT IS FURTHER ORDERED the motion for trial de
novo is DENIED.

IT IS FURTHER ORDERED the motion for recon-
sideration of the ruling by Judge Royston on July 21,
1984 and motion to compel is DENIED.

IT IS FURTHER ORDERED this matter may proceed
in its current posture as an appeal on the record, the file,
exhibits, hearing officer's report and findings.

App. 2

IT IS FURTHER ORDERED that motion to continue trial date is DENIED, and the trial date of August 8, 1986 is CONFIRMED.

Since the facts are no longer in dispute,

IT IS ORDERED the attorneys file with the Court a briefing schedule.

THE COURT FINDS that if there is some reason Plaintiff believes that the taking of testimony is necessary to avoid manifest injustice, Plaintiff is to file a pleading to that effect.

THE COURT FINDS the dates the hearing being appealed from were held commencing on October 21, 1982 and completed on October 27, 1982.

THE COURT FURTHER FINDS the date the complaint was filed was January 25, 1983.

THE COURT FURTHER FINDS the fact that pursuant to uncontroverted affidavit, a full and accurate copy of the transcripts could have been prepared through the month of October, 1984.

THE COURT FURTHER FINDS that Plaintiff did not order the transcript in the complaint and that the denial of the motion to compel, which included the transcript, took place 70 days prior to the destruction of the recording of the hearing, and there was no action taken by the Plaintiff during that period of time to order the transcript.

cc: Hon. Michael J. Brown (individually assigned)
Kenneth Graham, Esq. (Law Offices of William Risner)

App. 3

Michael Callahan, Esq. (Pima County Attorney's
Office)

Barry Corey, Esq. (Corey & Farrell)
